SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 142

THE UNITED STATES, PETITIONER

vs.

HOWARD C. MYERS

No. 143

THE UNITED STATES, PETITIONER

vs.

JOHN H. ARBLE

No. 144

THE UNITED STATES, PETITIONER

vs.

CHARLES C. MARTIN

No. 145

THE UNITED STATES PETITIONER

vs.

WALTER O. PLITZ

No. 146

THE UNITED STATES, PETITIONER

vs.

GEORGE H. SPITZ

ON PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS

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1 In the United States Court of Claims

I. *History of proceedings*

The original petitions were filed September 29, 1937.

A general traverse to the original petitions was filed November 8, 1937.

On April 3, 1940, the cases were argued and submitted together on merits by Mr. Robert M. Drysdale for plaintiffs, and by Mr. J. Frank Staley for defendant.

On January 6, 1941, the court filed findings of fact and conclusion of law. Plaintiff entitled to recover. Entry of judgment suspended to await the filing of a stipulation on the taking of proof as to the amount due plaintiffs, with opinion by Chief Justice Whaley.

On March 5, 1941, the defendant filed a motion for a new trial.

On March 12, 1941, the court filed an Order overruling defendant's motion for a new trial.

On June 12, 1941, the defendant filed a motion to refer the cases to a Commissioner which was allowed, and said cases were referred to Commissioner C. William Ramseyer.

On August 13, 1941, the plaintiff filed a motion for leave to file an amended petition in Nos. 43671, 43674, and 43675, which was allowed by the court on August 20, 1941, and amended petitions were filed in said cases.

On August 21, 1941, the plaintiffs filed a motion for judgment.

3 On September 3, 1941, a general traverse was filed to the amended petitions in Nos. 43671, 43674, and 43675.

On September 16, 1941, the court Ordered the plaintiffs' motion for judgment to the October Law Calendar for argument.

On October 6, 1941, the cases were argued and submitted together on plaintiffs' motion for judgment by Mr. Robert M. Drysdale for plaintiffs, and by Mr. J. Frank Staley for defendant.

On October 17, 1941, the court filed an Order withdrawing former findings, conclusion of law, and opinion, and remanding cases to the December Calendar for oral argument ab initio, as follows:

ORDER

On the court's own motion, it is ordered this 17th day of October 1941, that the special findings of fact, the conclusion of law, and opinion filed herein January 6, 1941, be and the same are vacated and withdrawn; and the case is now remanded to the December Calendar for oral argument ab initio.

On November 15, 1941, on motion of plaintiffs made therefor and allowed by the court, the cases were withdrawn from the

December Calendar and referred to Commissioner Ewart W. Hobbs for the taking of further proof.

In The United States Court of Claims

No. 43671

HOWARD C. MEYERS, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

II. Amended Petition

Filed August 20, 1941

To the Honorable the Chief Justice and Judges of the Court of Claims:

Plaintiff respectfully represents and shows:

(1) Plaintiff is a citizen of the United States and a resident of the State of Michigan, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the United States.

6 (2) Prior to September 1st, 1931, plaintiff was duly appointed a Customs inspector at the port of the city of Detroit; and ever since then has held said position and now is such an inspector. His salary as such inspector during all of the period of time hereinafter set forth was fixed at $2,100.00 per year.

(3) The Acts of Congress of February 7th, 1920 (41 Stat. L. 402) being an amendment to Section 5 of the Act of Congress of February 13th, 1911, which provided for the lading or unlading of vessels at night provides, as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not

to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Said Act of Congress of February 7th, 1920 (41 Stat. L. 402), was made by reference a part of the Acts of Congress of June 17th, 1930 (Ch. 497, 46 Stat. L. 590) and known as the Tariff Act of 1930. The sections of said Tariff Act of 1930 applicable to plaintiff's claim are as follows:

"SEC. 450. UNLOADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe" (46 Stat. L. 715).

"SEC. 451. SAME—EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector condi-

tioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes,' approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday" (46 Stat. L. 715).

9 Section 401 (46 Stat. L. 708) of said Tariff Act of 1930, defines the word vehicle as used in said act as follows:

"VEHICLE: The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."

(4) Such were the Acts of Congress that were in effect from September 1st, 1931, until August 31st, 1937, and during which time plaintiff performed the services for which extra compensation is herein sought and on which said Acts of Congress and T. D. 38290 hereinafter referred to, the claim of plaintiff is founded.

Regulation appertaining to said Acts of Congress, hereinbefore mentioned, were issued by the Bureau of Customs of the United States Treasury Department and are contained in the Customs regulations of 1931 and the provisions thereof which are applicable to plaintiff's claim, are as follows, viz:

Article 1228 dealing with extra compensation. Article 1229, defining night and holiday. Article 1230, appertaining to rate of compensation. Article 1231, dealing with services performed on

Sundays and holidays. Article 1446, dealing with official hours of certain Customs employees. Plaintiff's claim is also founded on said Customs regulation in so far, however, as they do not conflict with said Acts of Congress.

(5) In accordance with the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402), the Secretary of the Treasury fixed a reasonable rate of extra compensation for overtime services performed during night time, and on Sundays and holidays as required by said Act, and fixed said rate of compensation at the same rate as provided by said Act as aforesaid (T. D. 38290) and such order of the Secretary of the Treasury was effective during all of the period of time hereinafter set forth during which plaintiff performed the services for which compensation is herein sought.

(6) The extra compensation as so fixed by said Act of Congress of February 7th, 1920 (41 Stat. L. 402) was paid to the Customs inspectors and officers at the port of Detroit, Michigan, for the same kind of services as those for which compensation is herein sought and which were performed at night time and on Sundays and holidays until the opening of the Ambassador bridge, so-called, hereinafter mentioned, on or about November 15th, 1929.

(7) During the period of time commencing with September 1st, 1931, and ending August 31st, 1937, plaintiff was required by the collector of Customs at Detroit, Michigan, to and he did perform services as a Customs inspector at night time, being the hours between five o'clock postmeridian and eight o'clock antemeridian, and on Sundays and holidays at the port of Detroit, Michigan, at the following stations, viz: Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel; Ambassador bridge; Michigan Central Tunnel; Wabash Railway Ferries; Pere Marquette Railway Ferries; Grand Trunk Railway Ferries, and which said services so performed by him, were in connection with the unlading, receiving, and examination of passengers' baggage and the unlading of merchandise, baggage, and passengers arriving in the United States from foreign ports or places at certain of said stations, namely: Detroit and Windsor Ferry, Walkerville Ferry, Detroit and Canada Tunnel and Ambassador bridge, and in connection with the unlading of merchandise arriving in the United States from foreign ports or places at certain of said stations, viz, Michigan Central Tunnel, Wabash Railway Ferry, Pere Marquette Railway Ferry and Grand Trunk Railway Ferry. Plaintiff has caused to be prepared an itemized statement showing the amount due him for such services performed by him based upon said rate of overtime pay and showing the amounts due to plaintiff for night and Sunday and holiday

services so performed by him at each of said stations and during the periods of time within which said services were performed by him and which statement is annexed hereto and marked
11 "Schedule A" and made a part hereof. There is due to the plaintiff for said services the sum of $13,759.41 and there are no just credits or off-sets against said sum due plaintiff for said services and no part thereof has been paid.

(8) Said Detroit and Windsor Tunnel is a tube under the Detroit river connecting Detroit, Michigan, and Windsor, Ontario. Said Ambassador bridge is a bridge across the Detroit river connecting Detroit, Michigan, with Sandwich, Ontario. Ever since the opening of said tunnel and said bridge there has been over each of them respectively, a continuous flow of automobile and vehicular traffic including international bus service during twenty-four hours of every day of the week, including Sundays and holidays.

Said Ambassador bridge was open to traffic in the year 1929, and said tunnel was open to traffic in the year 1930. At about the time of the opening of said Ambassador bridge, the collector of Customs, or one of his deputies issued instructions that thereafter the customary working hours of Customs inspectors at the port of Detroit, would be any eight hour period of any twenty-four hours of any day during the week, including Sundays and holidays, and thereafter during the period of time covered by plaintiff's claim, plaintiff was not paid for the said services so performed by him at night time and on Sundays and holidays.

(9) The customary working hours at the port of Detroit, were then and now are from eight o'clock antemeridian until five o'clock postmeridian during week days, and such customary hours did not then nor do they now include Sundays or holidays or night time services as defined by said Act, and the instructions so issued by the said collector of Customs, or his deputy, were contrary to the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402).

(10) No action has been taken with respect to plaintiff's claim by Congress and no application has been made to Congress
12 for consideration of plaintiff's claim. The Customs inspectors at the port of the city of Detroit, Michigan, who performed similar night time, Sunday and holiday services, appointed an overtime committee to present the claims of plaintiff and other such Customs inspectors to the proper authorities and department. That committee filed with the collector of Customs, of Detroit, Michigan, a letter outlining their claims with a brief attached supporting their contention. At the request of the collector of Customs at Detroit, Michigan, said letter and

brief were transmitted to the controller of United States, and to the Commissioner of Customs, and to the Secretary of the Treasury. By letter bearing date of November 4th, 1936, to the collector of Customs at Detroit, Michigan, the Secretary of the Treasury declined to honor claims for such services.

(11) No assignment or transfer of plaintiff's claim or of any part thereof or interest therein has been made and no person other than the plaintiff is the owner thereof or interested therein.

(12) The plaintiff is justly entitled to recover from the United States for said services the said sum of $13,759.41 after allowing all just credits and off-sets.

(13) The said services performed by plaintiff in the month of September 1931, by custom established by the collector of Customs at Detroit, Michigan, were not due and payable until after October 1st, 1931.

(14) Plaintiff believes the facts as stated in this petition to be true.

Wherefore plaintiff prays judgment against the United States for the said sum of $13,759.41.

ROBERT M. DRYSDALE.
Attorney of Record for Plaintiff.

Business Address: 1538 Dime Bank Building, Detroit, Michigan.

13 [*Duly sworn to by Robert M. Drysdale; jurat omitted in printing.*]

Exhibit A—to amended petition

Inspector—HOWARD C. MYERS

Inclusive dates		Annual rate of pay	Percent off for economy	Detroit and Windsor Ferry		Walkerville Ferry		Detroit and Canada Tunnel		Ambassador Bridge		M. C. R. R. Tunnel		Wabash Ferries (night)	P. - M. Ry. Ferries (night)	P. M. Ry. (Sunday)
From—	To—			Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday			
9/1/31	11/1/31	$2,100	F									$416.78	$104.94			
10/2/31	12/31/31	"	F					$320.71	$58.30							
1/1/32	3/23/33	"	F									2,955.81	443.08			
4/5/33	6/25/33	"	15									461.83	39.64			
6/26/33	8/4/33	"	15							$215.57	$29.73					
8/7/33	10/22/33	"	15												$478.30	$2.48
11/17/33	1/30/34	"	15					371.69	59.46							
2/5/34	2/15/34	"	10					84.45								
2/16/34	4/5/34	"	10												304.33	
4/25/34	6/30/34	"	10							343.69	83.96					
7/1/34	3/31/35	"	5							1,409.57	365.52					
4/1/35	4/6/35	"	F							34.98						
4/25/35	4/30/35	"	F												35.00	
5/1/35	8/1/35	"	F											$405.39		
8/2/35	10/11/35	"	F							480.98	93.28					
10/12/35	10/15/35	"	F											2.92		
10/16/35	3/24/36	"	F					1,072.72	209.88							
4/24/36	7/21/36	"	F							443.15	151.58					
7/23/36	9/30/36	"	F											320.80		
10/1/36	5/26/37	"	F			$991.29	$338.14									
5/28/37	8/12/37	"	F											293.63		
	8/9/37	"	F												11.66	
	8/13/37	"	F	$11.66												
8/16/37	8/20/37	"	F							49.57						
Total Sundays, holidays							338.14		327.64		724.07		587.66			2.48
Total night				11.66		991.29		1,859.57		2,977.51		3,834.42		1,122.74	829.29	

Total Sunday	$1,979.99
Total night	11,629.48
Total	$13,506.97
To equalize the amount as per proofs	252.74
Grand total	13,759.41

17 *III. General traverse to the amended petition*

Filed September 3, 1941

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

(Sgd.) FRANCIS M. SHEA,
Assistant Attorney General.

OK J. F. S.
S. J. K.

18 In the United States Court of Claims

No. 43672

JOHN H. ARBLE, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

IV. Petition

Filed September 29, 1937

To the Honorable the Chief Justice and Judges of the Court of Claims:

Plaintiff respectfully represents and shows:

(1) Plaintiff is a citizen of the United States and a resident of the State of Michigan, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the United States.

20 (2) Prior to September 1st, 1931, plaintiff was duly appointed a Customs inspector at the port of the city of Detroit, and ever since then has held said position and now is such an inspector. His salary as such inspector during all of the period of time hereinafter set forth was fixed at $2,100.00 per year.

(3) The Acts of Congress of February 7th, 1920 (41 Stat. L. 402), being an amendment to Section 5 of the Act of Congress of February 13th, 1911, which provided for the lading or unlading of vessels at night provides, as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors storekeepers, weighers, and other customs officers and employees

who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half day's pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Said Act of Congress of February 7th, 1920 (41 Stat. L. 402), was made by reference a part of the Acts of Congress of June 17th, 1930 (Ch. 497, 46 Stat. L. 590) and known as the Tariff Act of 1930. The sections of said Tariff Act of 1930 applicable to plaintiff's claim are as follows:

"SEC. 450. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a
22 holiday or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe" (46) Stat. L. 715).

"SEC. 451. SAME—EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes,' approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday" (46 Stat. L. 715).

23 Section 401 (46 Stat. L. 708) of said Tariff Act of 1930, defines the word vehicle as used in said act as follows:

"VEHICLE: The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."

(4) Such were the Acts of Congress that were in effect from September 1st, 1931, until August 31st, 1937, and during which

time plaintiff performed the services for which extra compensation is herein sought and on which said Acts of Congress and T. D. 38290 hereinafter referred to, the claim of plaintiff is founded.

Regulations appertaining to said Acts of Congress, hereinbefore mentioned, were issued by the Bureau of Customs of the United States Treasury Department and are contained in the Customs regulations of 1931 and the provisions thereof which are applicable to plaintiff's claim, are as follows, viz:

Article 1228, dealing with extra compensation. Article 1229, defining night and holiday. Article 1230, appertaining to rate of compensation. Article 1231, dealing with services performed on Sundays and holidays. Article 1446, dealing with official hours of certain Customs employees. Plaintiff's claim is also founded on said Customs regulations in so far, however, as they do not conflict with said Acts of Congress.

(5) In accordance with the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402), the Secretary of the Treasury fixed a reasonable rate of extra compensation for overtime services performed during night time, and on Sundays and holidays, as required by said Act, and fixed said rate of compensation at the same rate as provided by said Act as aforesaid (T. D. 38290) and such order of the Secretary of the Treasury was effective during all of the period of time hereinafter set forth during which plaintiff performed the services for which compensation is herein sought.

24 (6) The extra compensation as so fixed by said Act of Congress of February 7th, 1920 (41 Stat. L. 402), was paid to the Customs inspectors and officers at the port of Detroit, Michigan, for the same kind of services as those for which compensation is herein sought and which were performed at night time and on Sundays and holidays until the opening of the Ambassador bridge, so-called, hereinafter mentioned, on or about November 15th, 1929.

(7) During the period of time commencing with September 1st, 1931, and ending August 31st, 1937, plaintiff was required by the collector of Customs at Detroit, Michigan, to and he did perform services as a Customs inspector at night time, being the hours between five o'clock postmeridian and eight o'clock antemeridian, and on Sundays and holidays at the port of Detroit, Michigan, at the following stations, viz: Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel; Ambassador bridge; Michigan Central Tunnel; Wabash Railway Ferries; Grand Trunk Railway Ferries; Miller Ferry Line, St. Clair, and which said services so performed by him, were in connection with the unlading, receiving, and examination of passengers' baggage and the

unlading of merchandise, baggage, and passengers arriving in the United States from foreign ports or places at certain of said stations, namely: Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel, and Ambassador bridge and in connection with the unlading of merchandise arriving in the United States from foreign ports or places at certain of said stations, viz. Michigan Central Tunnel, Wabash Railway Ferry, Grand Trunk Railway Ferry, and Miller Ferry Line, St. Clair. Plaintiff has caused to be prepared an itemized statement showing the amount due him for such services performed by him based upon said rate of overtime pay and showing the amounts due to plaintiff for night and Sunday and holiday services so performed by him at each of said stations and during the periods of time within which said services were performed by him and which statement is annexed hereto and marked "Schedule A" and made a part hereof. There is due to the plaintiff for said services the sum of $10,898.14 and there are no just credits or off-sets against said sum due plaintiff for said services and no part thereof has been paid.

(8) Said Detroit and Windsor Tunnel is a tube under the Detroit river connecting Detroit, Michigan, and Windsor, Ontario. Said Ambassador bridge is a bridge across the Detroit river connecting Detroit, Michigan, with Sandwich, Ontario. Ever since the opening of said tunnel and said bridge there has been over each of them, respectively, a continuous flow of automobile and vehicular traffic including international bus service during twenty-four hours of every day of the week, including Sundays and holidays.

Said Ambassador bridge was open to traffic in the year 1929, and said tunnel was open to traffic in the year 1930. At about the time of the opening of said Ambassador bridge, the collector of Customs, or one of his deputies issued instructions that thereafter the customary working hours of Customs inspectors at the port of Detroit would be any eight hour period of any twenty-four hours of any day during the week, including Sundays and holidays, and thereafter during the period of time covered by plaintiff's claim, plaintiff was not paid for the said services so performed by him at night time and on Sundays and holidays.

(9) The customary working hours at the port of Detroit were then and now are from eight o'clock antemeridian until five o'clock postmeridian during week days, and such customary hours did not then nor do they now include Sundays or holidays or night time services as defined by said Act, and the instructions so issued by the said collector of Customs, or his deputy, were contrary to

the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402).

(10) No action has been taken with respect to plaintiff's claim by Congress and no application has been made to Congress
26 for consideration of plaintiff's claim. The Customs inspectors at the port of the city of Detroit, Michigan, who performed similar night time, Sunday, and holiday services, appointed an overtime committee to present the claims of plaintiff and other such Customs inspectors to the proper authorities and department. That committee filed with the collector of Customs, of Detroit, Michigan, a letter outlining their claims with a brief attached supporting their contention. At the request of the collector of Customs at Detroit, Michigan, said letter and brief were transmitted to the controller of United States and to the Commissioner of Customs, and to the Secretary of the Treasury. By letter bearing date of November 4th, 1936, to the collector of Customs at Detroit, Michigan, the Secretary of the Treasury declined to honor claims for such services.

(11) No assignment or transfer of plaintiff's claim or of any part thereof or interest therein has been made and no person other than the plaintiff is the owner thereof or interested therein.

(12) The plaintiff is justly entitled to recover from the United States for said services the said sum of $10,898.14 after allowing all just credits and off-sets.

(13) The said services performed by plaintiff in the month of September 1931, by custom established by the collector of Customs at Detroit, Michigan, were not due and payable until after October 1st, 1931.

(14) Plaintiff believes the facts as stated in this petition to be true.

Wherefore plaintiff prays judgment against the United States for the said sum of $10,898.14.

ROBERT M. DRYSDALE.
Attorney of Record for Plaintiff.

Business Address: 2213 Dime Bank Building, Detroit, Michigan.

27 [*Duly sworn to by Robert M. Drysdale; jurat omitted in printing.*]

Schedule A—to petition

Inclusive dates		Annual rate of pay	Percent off for economy	Detroit and Windsor Ferry		Walkerville Ferry		Detroit and Canada Tunnel		Ambassador Bridge		M. C. R. R. Tunnel		Wabash Ferries (night)	P. M. Ry. Ferries (night)	G. T. Ry. Slip Dock (night)	G. T. Slip Dock (Sunday, holiday)	Miller Ferry Line St. Clair, Mich.	
From	To			Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday holiday					Night	Sunday, holiday
9/1/31	11/30/31	$2.100	F					$1,778.21	$396.44			$489.72	$63.28						
12/1/31	11/14/32	"	"															No record	No record
11/15/32	11/27/32	"	"	$52.47														$421.42	$158.56
11/28/32	3/31/33	"	"																
4/1/33	12/31/33	"	15							$215.57	$19.82			$2.48					
1/1/34	1/31/34	"	15																
2/1/34		"	15							157.41	73.46								
2/1/34	3/18/34	"	10																
4/1/34	6/30/34	"	10	472.30	$52.47														
7/1/34	2/8/35	"	5	1,024.78	232.01														
1/28/30/35		"	5			$11.08										$288.00	$22.16		
2/9/35	3/31/35	"	5													46.64			
4/1/35	4/6/35	"	5																
5/4/35	7/10/35	"	"	262.45	81.62											233.20	23.32		
7/11/35	8/15/35	"	"					1,568.38	279.84										
8/16/35	5/21/36	"	"													93.28			
5/22/36	10/31/36	"	"	731.79	103.24														
8/16, and 9/1/1936		"	"													23.32			
11/1/36	12/31/36	"	"	277.60	69.96														
Nov. 1936		"	"																
1/1/37	8/31/37	"	"	749.36	240.50														
Total Sundays holidays					501.40				676.28		93.28		93.28				45.48		158.56
Total night				3,611.15		11.08		3,346.59		372.98		489.72		2.48		684.44		421.42	

Total night	$8,939.80
Total Sundays and holidays	1,958.28
Grand total	$10,898.14

31 *V. General traverse to the petition*
Filed November 8, 1937

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained: and asks judgment that the petition be dismissed.

(Sgd.) SAM E. WHITAKER,
Assistant Attorney General.

OK J. F. S.

33 In the United States Court of Claims

No. 43673

CHARLES C. MARTIN, PLAINTIFF

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

VI. Petition

Filed September 29, 1937

To the Honorable the Chief Justice and Judges of the Court of Claims:

Plaintiff respectfully represents and shows:

(1) Plaintiff is a citizen of the United States and a resident of the State of Michigan, and has at all times borne true allegiance to the Government of the United States, and has not in any way aided, abetted or given encouragement to rebellion against the United States.

34 (2) Prior to September 1st, 1931, plaintiff was duly appointed a Customs inspector at the port of the city of Detroit, and ever since then has held said position and now is such an inspector. His salary as such inspector during all of the period of time hereinafter set forth was fixed at $2,100.00 per year.

(3) The Acts of Congress of February 7th, 1920 (41 Stat. L. 402) being an amendment to Section 5 of the Act of Congress of February 13th, 1911, which provided for the lading or unlading of vessels at night provides, as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the

hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Said Act of Congress of February 7th, 1920 (41 Stat. L. 402), was made by reference a part of the Acts of Congress of June 17th, 1930 (Ch. 497, 46 Stat. L. 590) and known as the Tariff Act of 1930. The sections of said Tariff Act of 1930 applicable to plaintiff's claim are as follows:

"SEC. 450. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT. No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday,
36 a holiday or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe" (46 Stat. L. 715).

"SEC. 451. SAME—EXTRA COMPENSATION. Before any such special license to unlade shall be granted, the master, owner, or agent of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes,' approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday" (46 Stat. L. 715).

37 Section 401 (46 Stat. L. 708) of said Tariff Act of 1930, defines the word vehicle as used in said act as follows:

"VEHICLE: The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."

(4) Such were the Acts of Congress that were in effect from September 1st, 1931 until August 31st, 1937, and during which time plaintiff performed the services for which extra compensation is herein sought and on which said Acts of Congress and T. D. 38290 hereinafter referred to, the claim of plaintiff is founded.

Regulations appertaining to said Acts of Congress, hereinbefore mentioned, were issued by the Bureau of Customs of the United States, Treasury Department and are contained in the Customs regulations of 1931 and the provisions thereof which are applicable to plaintiff's claim, are as follows, viz:

Article 1228, dealing with extra compensation. Article 1229, defining night and holiday. Article 1230, appertaining to rate of compensation. Article 1231, dealing with services performed on Sundays and holidays. Article 1446, dealing with official hours of certain Customs employees. Plaintiff's claim is also founded on said Customs regulations in so far, however, as they do not conflict with said Acts of Congress.

(5) In accordance with the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402), the Secretary of the Treasury fixed a reasonable rate of extra compensation for overtime services performed during night time, and on Sundays and holidays as required by said Act, and fixed said rate of compensation at the same rate as provided by said Act as aforesaid (T. D. 38290) and such order of the Secretary of the Treasury was effective during all of the period of time hereinafter set forth during which plaintiff performed the services for which compensation is herein sought.

38 (6) The extra compensation as so fixed by said Act of Congress of February 7th, 1920 (41 Stat. L. 402) was paid to the Customs inspectors and officers at the port of Detroit, Michigan, for the same kind of services as those for which compensation is herein sought and which were performed at night time and on Sundays and holidays until the opening of the Ambassador bridge, so-called, hereinafter mentioned, on or about November 15th, 1929.

(7) During the period of time commencing with September 1st, 1931, and ending August 31st, 1937, plaintiff was required by the collector of Customs at Detroit, Michigan, to and he did perform services as a Customs inspector at night time, being the hours between five o'clock postmeridian and eight o'clock antemeridian, and on Sundays and holidays at the port of Detroit, Michigan, at the following stations, viz: Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel; Ambassador bridge; Michigan Central Tunnel; Wabash Railway Ferries; Pere Mar-

quette Railway Ferries; Grand Trunk Railway Ferries, and which said services so performed by him, were in connection with the unlading, receiving and examination of passengers' baggage and the unlading of merchandise, baggage and passengers arriving in the United States from foreign ports or places at certain of said stations namely; Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel and Ambassador bridge and in connection with the unlading of merchandise arriving in the United States from foreign ports or places at certain of said stations, viz. Michigan Central Tunnel, Wabash Railway Ferry, Pere Marquette Railway Ferry and Grand Trunk Railway Ferry. Plaintiff has caused to be prepared an itemized statement showing the amount due him for such services performed by him based upon said rate of overtime pay and showing the amounts due to plaintiff for night and Sunday and holiday services so performed by him at each of said stations and during the periods of time within which said services were performed by him and which statement is annexed hereto and marked "Schedule A" and
39 made a part hereof. There is due to the plaintiff for said services the sum of $12,206.92 and there are no just credits or off-sets against said sum due plaintiff for said services and no part thereof has been paid.

(8) Said Detroit and Windsor Tunnel is a tube under the Detroit river connecting Detroit, Michigan, and Windsor, Ontario; Said Ambassador bridge is a bridge across the Detroit river connecting Detroit, Michigan, with Sandwich, Ontario. Ever since the opening of said tunnel and said bridge there has been over each of them respectively, a continuous flow of automobile and vehicular traffic including international bus service during twenty-fours of every day of the week, including Sundays and holidays. Said Ambassador bridge was open to traffic in the year 1929, and said tunnel was open to traffic in the year 1930. At about the time of the opening of said Ambassador bridge, the collector of Customs, or one of his deputies issued instructions that thereafter the customary working hours of Customs inspectors at the port of Detroit, would be any eight hour period of any twenty-four hours of any day during the week, including Sundays and holidays, and thereafter during the period of time covered by plaintiff's claim, plaintiff was not paid for the said services so performed by him at night time and on Sundays and holidays.

(9) The customary working hours at the port of Detroit, were then and now are from eight o'clock antemeridian until five o'clock postmeridian during week days, and such customary hours did not then nor do they now include Sundays or holidays, or night time services as defined by said Act, and the instructions so issued

by the said collector of Customs, or his deputy, were contrary to the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402).

(10) No action has been taken with respect to plaintiff's claim by Congress and no application has been made to Congress
40 for consideration of plaintiff's claim. The Customs inspectors at the port of the city of Detroit, Michigan, who performed similar night time, Sunday and holiday services, appointed an overtime committee to present the claims of plaintiff and other such Customs inspectors to the proper authorities and department. That committee filed with the collector of Customs, of Detroit, Michigan, a letter outlining their claims with a brief attached supporting their contention. At the request of the collector of Customs at Detroit, Michigan, said letter and brief were transmitted to the controller of United States and to the Commissioner of Customs, and to the Secretary of the Treasury. By letter bearing date of November 4th, 1936, to the collector of Customs at Detroit, Michigan, the Secretary of the Treasury declined to honor claims for such services.

(11) No assignment or transfer of plaintiff's claim or of any part thereof or interest therein has been made and no person other than the plaintiff is the owner thereof or interested therein.

(12) The plaintiff is justly entitled to recover from the United States for said services the said sum of $12,206.92 after allowing all just credits and set-offs.

(13) The said services performed by plaintiff in the month of September 1931, by custom established by the collector of Customs at Detroit, Michigan, were not due and payable until after October 1st, 1931.

(14) Plaintiff believes the facts as stated in this petition to be true.

Wherefore plaintiff prays judgment against the United States for the said sum of $12,206.92.

ROBERT M. DRYSDALE,
Attorney of Record for Plaintiff.

Business Address: 2213 Dime Bank Building, Detroit, Michigan.

41 [*Duly sworn to by Robert M. Drysdale; jurat omitted in printing.*]

Schedule A to petition

Inclusive dates From	To	Annual rate of pay	Per-cent off for econ-omy	Detroit and Windsor Ferry Night	Detroit and Windsor Ferry Sunday, holiday	Walkerville Ferry Night	Walkerville Ferry Sunday, holiday	Detroit and Canada Tunnel Night	Detroit and Canada Tunnel Sunday, holiday	Ambassador Bridge Night	Ambassador Bridge Sunday, holiday	M. C. R. R. Tunnel Night	M. C. R. R. Tunnel Sunday, holiday	Wabash Ferries (night)	P. M. Ry. Ferries (night)	G. T. Ry. Slip Dock (night)
9/1/31	10/16/32	$2,100	Full							$2,259.29	$513.04					
10/17/32	1/3/33	"	"											$233.32		
1/6/33	1/29/33	"	"											109.15		
1/30/33		"	"												811.05	
2/3/33	3/31/33	"	"												282.87	
4/25/33	5/10/33	"	15					$113.97	$19.82							
5/11/33		"	"											4.95		
5/12/33		"	"												2.48	
5/15/33	5/16/33	"	"											14.87		
5/17/33		"	"												9.91	
5/18/33		"	"											7.44		
5/22/33		"	"											7.44		
5/23/33	7/2/33	"	"												289.05	
7/3/33	8/13/33	"	"											183.43		
8/14/33		"	"												9.91	
8/16/33		"	"											7.44		
8/21/33	8/23/33	"	"											22.31		
8/24/33	8/26/33	"	"												14.87	
9/8/33	9/25/33	"	"	$54.51	$19.82										158.62	
9/26/33	10/22/33	"	"											9.91		
10/24/33		"	"												39.64	
10/25/33	10/28/33	"	"											9.91		
10/29/33		"	"												19.82	
10/30/33	10/31/33	"	"											7.44		
11/1/33	11/28/33	"	"			$116.43	$19.82									
11/29/33		"	"											14.87		
11/30/33	12/11/33	"	"			29.75	29.73									
12/29/33	1/17/34	"	"					39.64	39.64							
1/18/34	1/19/34	"	"												18.37	
1/20/34	1/31/34	"	"					109.02								
2/5/34	2/22/34	"	10					57.72	31.48							
2/23/34	2/25/34	"	"												349.02	
2/26/34	4/24/34	"	"					228.62	20.98					55.39		
5/14/34	6/30/34	"	"					259.07	52.47						22.15	
7/1/34	9/8/34	"	5					487.39	99.08					11.08		
9/9/34	10/31/34	"	"													
11/1/34	11/8/34	"	"													
11/9/34	11/10/34	"	"													
11/11/34		"	"													

| | | |

45 *VII. General traverse to the petition*

Filed November 8, 1937

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

(Sgd.) SAM. E. WHITAKER,
Assistant Attorney General.

OK J. F. S.

47 In the United States Court of Claims

No. 43674

WALTER O. PLITZ, PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT

VIII. Amended petition

Filed August 20, 1941

To the Honorable the Chief Justice and Judges of the Court of Claims:

Plaintiff respectfully represents and shows:

(1) Plaintiff is a citizen of the United States and a resident of the State of Michigan, and has at all times borne true allegiance to the Government of the United States, and has not in way aided, abetted or given encouragement to rebellion against the United States.

48 (2) Prior to September 1st, 1931, plaintiff was duly appointed a Customs inspector at the port of the city of Detroit, and ever since then has held said position and now is such an inspector. His salary as such inspector during all of the period of time hereinafter set forth was fixed at $2,100.00 per year.

(3) The Acts of Congress of February 7th, 1920 (41 Stat. L. 402) being an amendment to Section 5 of the Act of Congress of February 13th, 1911, which provided for the lading or unlading of vessels at night provides, as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees

who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance, whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the Collector of Customs, who shall pay the same to the
49 several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Said Act of Congress of February 7th, 1920 (41 Stat. L. 402), was made by reference a part of the Acts of Congress of June 17th, 1930 (Ch. 497, 46 Stat. L. 590) and known as the Tariff Act of 1930. The sections of said Tariff Act of 1930 applicable to plaintiff's claim are as follows:

"SEC. 450. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe" (46 Stat. L. 715).

"SEC. 451. SAME—EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to idemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes,' approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday" (45 Stat. L. 715).

51 Section 401 (46 Stat. L. 708) of said Tariff Act of 1930, defines the word vehicle as used in said act as follows:

"VEHICLE: The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."

(4) Such were the Acts of Congress that were in effect from September 1st, 1931 until August 31st, 1937, and during which

time plaintiff performed the services for which extra compensation is herein sought and on which said Acts of Congress and T. D. 38290 hereinafter referred to, the claim of plaintiff is founded.

Regulations appertaining to said Acts of Congress, hereinbefore mentioned, were issued by the Bureau of Customs of the United States Treasury Department and are contained in the Customs regulations of 1931 and the provisions thereof which are applicable to plaintiff's claim, are as follows, viz;

Article 1228, dealing with extra compensation. Article 1229, defining night and holiday. Article 1230, appertaining to rate of compensation. Article 1231, dealing with services performed on Sundays and holidays. Article 1446, dealing with official hours of certain Customs employees. Plaintiff's claim is also founded on said Customs regulations in so far, however, as they do not conflict with said Acts of Congress.

(5) In accordance with the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402), the Secretary of the Treasury fixed a reasonable rate of extra compensation for overtime services performed during nighttime, and on Sundays and holidays as required by said Act, and fixed said rate of compensation at the same rate as provided by said Act as aforesaid (T. D. 38290) and such order of the Secretary of the Treasury was effective during all of the period of time hereinafter set forth during which plaintiff performed the services for which compensation is herein sought.

52 (6) The extra compensation as so fixed by said Act of Congress of February 7th, 1920 (41 Stat. L. 402) was paid to the Customs inspectors and officers at the port of Detroit, Michigan, for the same kind of services as those for which compensation is herein sought and which were performed at night time and on Sundays and holidays until the opening of the Ambassador bridge, so-called, hereinafter mentioned, on or about November 15th, 1929.

(7) During the period of time commencing with September 1st, 1931, and ending August 31st, 1937, plaintiff was required by the collector of Customs at Detroit, Michigan, to and he did perform services as a Customs inspector at night time, being the hours between five o'clock postmeridian and eight o'clock antemeridian, and on Sundays and holidays at the port of Detroit Michigan, at the following stations, viz: Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel; Ambassador bridge; Michigan Central Tunnel; Wabash Railway Ferries; Pere Marquette Railway Ferries; Grand Trunk Railway Ferries, and which said services so performed by him, were in connection with the unlading, receiving and examination of pas-

sengers' baggage and the unlading of merchandise, baggage and passengers arriving in the United States from foreign ports or places at certain of said stations namely; Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel and Ambassador bridge and in connection with the unlading of merchandise arriving in the United States from foreign ports or places at certain of said stations, viz, Michigan Central Tunnel, Wabash Railway Ferry, Pere Marquette Railway Ferry and Grand Trunk Railway Ferry. Plaintiff has caused to be prepared an itemized statement showing the amount due him for such services performed by him based upon said rate of overtime pay and showing the amounts due to plaintiff for night and Sunday and holiday services so performed by him at each of said stations and during the periods of time within which said services were performed by him and which statement is annexed hereto and marked
53 "Schedule A" and made a part hereof. There is due to the plaintiff for said services the sum of $12,227.94 and there are no just credits or off-sets against said sum due plaintiff for said services and no part thereof has been paid.

(8) Said Detroit and Windsor Tunnel is a tube under the Detroit river connecting Detroit, Michigan, and Windsor, Ontario. Said Ambassador bridge is a bridge across the Detroit river connecting Detroit, Michigan, with Sandwich, Ontario. Ever since the opening of said tunnel and said bridge there has been over each of them respectively, a continuous flow of automobile and vehicular traffic including international bus service during twenty-four hours of every day of the week, including Sundays and holidays.

Said Ambassador bridge was open to traffic in the year 1929, and said tunnel was open to traffic in the year 1930. At about the time of the opening of said Ambassador bridge, the collector of Customs, or one of his deputies issued instructions that thereafter the customary working hours of Customs inspectors at the port of Detroit, would be any eight hour period of any twenty-four hours of any day during the week, including Sundays and holidays, and thereafter during the period of time covered by plaintiff's claim, plaintiff was not paid for the said services so performed by him at night time and on Sundays and holidays.

(9) The customary working hours at the port of Detroit, were then and now are from eight o'clock antemeridian until five o'clock postmeridian during week days, and such customary hours did not then nor do they now include Sundays or holidays or night time services as defined by said Act, and the instructions so issued by the said collector of Customs, or his deputy, were contrary to the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402).

(10) No action has been taken with respect to plaintiff's claim by Congress and no application has been made to Congress
54 for consideration of plaintiff's claim. The Customs inspectors at the port of the city of Detroit, Michigan, who performed similar night time, Sunday and holiday services, appointed an overtime committee to present the claims of plaintiff and other such Customs inspectors to the proper authorities and department. That committee filed with the collector of Customs, of Detroit, Michigan, a letter outlining their claims with a brief attached supporting their contention. At the request of the collector of Customs at Detroit, Michigan, said letter and brief were transmitted to the controller of United States and to the Commissioner of Customs, and to the Secretary of the Treasury. By letter bearing date of November 4th, 1936, to the collector of Customs at Detroit, Michigan, the Secretary of the Treasury declined to honor claims for such services.

(11) No assignment or transfer of plaintiff's claim or of any part thereof or interest therein has been made and no person other than the plaintiff is the owner thereof or interested therein.

(12) The plaintiff is justly entitled to recover from the United States for said services the said sum of $12,277.94 after allowing all just credits and off-sets.

(13) The said services performed by plaintiff in the month of September 1931, by custom established by the collector of Customs at Detroit, Michigan, were not due and payable until after October 1st, 1931.

(14) Plaintiff believes the facts as stated in this petition to be true.

Wherefore plaintiff prays judgment against the United States for the said sum of $12,277.94.

ROBERT M. DRYSDALE,
Attorney of Record for Plaintiff.

Business Address: 1538 Dime Bank Building, Detroit, Michigan.

55 [Duly sworn to by Robert M. Drysdale; *jurat omitted in printing.*]

Exhibit A to amended petition

Inspector—WALTER O. PLITZ

Inclusive dates		Annual rate of pay	Percent off for economy	Detroit and Windsor Ferry		Walkerville Ferry		Detroit and Canada Tunnel		Ambassador Bridge		M. C. R. R. Tunnel		Wabash Ferries (night)	P. M. Ry. Ferries (night)
From—	To—			Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday		
9/1/31	10/14/31	$2,100		$204.15	$58.30										
10/16/31	2/29/32	2,100										$857.01	$163.24		
3/21/32	9/10/32	2,100								$1,061.08	$244.86				
10/1/32	3/31/33	2,100										967.78	104.84		
4/1/33	6/30/33	2,100	15									287.11	39.64		
8/8/33	1/19/34	2,100	15	679.02	138.74										
1/22/34	1/31/34	2,100	15							64.42	9.91				
2/1/34	3/10/34	2,100	10							199.39	31.49				
4/6/34	6/30/34	2,100	10					$203.53	$83.92						
7/1/34	11/30/34	2,100	5					928.23	177.28						
12/1/34	1/27/35	2,100	5												
Jan. and Feb. 1935		2,100	5												$274.23
February 1935		2,100	5											$132.95	
2/19/35	3/13/35	2,100													
4/6/35	10/28/35	2,100		988.40	198.22			171.40	11.08						11.08
10/29/35	1/20/36	2,100				$705.45									
Jan. and Feb. 1936		2,100													
Feb. and March 1936		2,100													198.22
4/5/36	7/18/36	2,100												46.66	
7/19/36	7/26/36	2,100		64.14	23.32			606.32	139.92						
7/27/36	9/15/36	2,100													
9/17/36	2/19/37	2,100												187.96	
3/10/37	3/22/37	2,100								399.38	198.22				
Mar. to Aug. 1937		2,100										139.92			
May to Aug. 1937		2,100								163.26	58.30				
															215.71

July to August 1937		2.100												
Total Sundays, holidays.				418.58				412.20		542.78		307.72	23.36	
Total Night			1,935.81		705.45		2,209.48		1,888.53		2,252.12		390.94	699.24

Total night	$10,081.57
Total Sunday and holiday	1,681.28
Total	$11,762.85
To equalize the amount due as per proofs	515.09
Grand total	$12,277.94

59 *IX. General traverse to the amended petition*

Filed Sept. 3, 1941.

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

(Sgd.) FRANCIS M. SHEA,
Assistant Attorney General.

OK J. F. S.
S. J. K.

61 In the United States Court of Claims

No. 43675

GEORGE H. SPITZ,
PLAINTIFF,

vs.

THE UNITED STATES OF AMERICA,
DEFENDANT

X. Amended petition

Filed August 20, 1941

To the Honorable the Chief Justice and Judges of the Court of Claims:

Plaintiff respectfully represents and shows:

(1). Plaintiff is a citizen of the United States and a resident of the State of Michigan, and has at all times borne true allegiance to the Government of the United States; and has not in any way aided, abetted or given encouragement to rebellion against the United States.

62 (2) Prior to September 1st, 1931, plaintiff was duly appointed a Customs inspector at the port of the city of Detroit, and ever since then has held said position and now is such an inspector. His salary as such inspector during all of the period of time hereinafter set forth was fixed at $2,100.00 per year.

(3) The Acts of Congress of February 7th, 1920 (41 Stat. L. 402) being an amendment to Section 5 of the Act of Congress of February 13th, 1911, which provided for the lading or unlading of vessels at night provides, as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the
63 several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rate prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Said Act of Congress of February 7th, 1920 (41 Stat. L. 402), was made by reference a part of the Acts of Congress of June

17th, 1930 (Ch. 497, 46 Stat. L. 590) and known as the Tariff Act of 1930. The sections of said Tariff Act of 1930 applicable to plaintiff's claim as are follows:

"SEC. 450. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a
64 holiday or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe" (46 Stat. L. 715).

"SEC. 451. EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to idemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes,' approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday" (46 Stat. L. 715).

65 Section 401 (46 Stat. L. 708) of said Tariff Act of 1930, defines the word vehicle as used in said act as follows:

"VEHICLE: The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."

(4) Such were the Acts of Congress that were in effect from September 1st, 1931 until August 31st, 1937, and during which time plaintiff performed the services for which extra compensation is herein sought and on which said Acts of Congress and T. D. 38290 hereinafter referred to, the claim of plaintiff is founded.

Regulations appertaining to said Acts of Congress, hereinbefore mentioned, were issued by the Bureau of Customs of the United States Treasury Department and are contained in the Customs regulations of 1931 and the provisions thereof which are applicable to plaintiff's claim, are as follows, viz:

Article 1228, dealing with extra compensation. Article 1229, defining night and holiday. Article 1230, appertaining to rate of compensation. Article 1231, dealing with services performed on Sundays and holidays. Article 1446, dealing with official hours of certain Customs employees. Plaintiff's claim is also founded on said Customs regulations in so far, however, as they do not conflict with said Acts of Congress.

(5) In accordance with the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402), the Secretary of the Treasury fixed a reasonable rate of extra compensation for overtime services performed during night time, and on Sundays and holidays as required by said Act, and fixed said rate of compensation at the same rate as provided by said Act as aforesaid (T. D. 38290) and such order of the Secretary of the Treasury was effective during all of the period of time hereinafter set forth during which plaintiff performed the services for which compensation is herein sought.

66 (6) The extra compensation as so fixed by said Act of Congress of February 7th, 1920 (41 Stat. L. 402) was paid to the Customs inspectors and officers at the port of Detroit, Michigan, for the same kind of services as those for which compensation is herein sought and which were performed at night time and on Sundays and holidays until the opening of the Ambassador bridge, so-called, hereinafter mentioned, on or about November 15th, 1929.

(7) During the period of time commencing with September 1st, 1931, and ending August 31st, 1937, plaintiff was required by the collector of Customs at Detroit, Michigan, to and he did per-

form services as a Customs inspector at night time, being the hours between five o'clock postmeridian and eight o'clock antemeridian, and on Sundays and holidays at the port of Detroit, Michigan, at the following stations, viz: Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel; Ambassador bridge; Michigan Central Tunnel; Wabash Railway Ferries; Pere Marquette Railway Ferries; Grand Trunk Railway Ferries, and which said services so performed by him, were in connection with the unlading, receiving and examination of passengers' baggage and the unlading of merchandise, baggage and passengers arriving in the United States from foreign ports or places at certain of said stations, namely: Detroit and Windsor Ferry; Walkerville Ferry; Detroit and Canada Tunnel and Ambassador bridge and in connection with the unloading of merchandise arriving in the United States from foreign ports or places at certain of said stations, viz, Michigan Central Tunnel, Wabash Railway Ferry, Pere Marquette Railway Ferry and Grand Trunk Railway Ferry. Plaintiff has caused to be prepared an itemized statement showing the amount due him for such services performed by him based upon said rate of overtime pay and showing the amounts due to plaintiff for night and Sunday and holiday services so performed by him at each of said stations and during the periods of time within which said services were performed by him and which statement is annexed hereto and marked "Schedule A" and made a

67 part hereof. There is due to the plaintiff for said services the sum of $10,267.68 and there are no just credits or off-sets against said sum due plaintiff for said services and no part thereof has been paid.

(8) Said Detroit and Windsor Tunnel is a tube under the Detroit river connecting Detroit, Michigan, and Windsor, Ontario. Said Ambassador bridge is a bridge across the Detroit river connecting Detroit, Michigan, with Sandwich, Ontario. Ever since the opening of said tunnel and said bridge there has been over each of them respectively, a continuous flow of automobile and vehicular traffic including international bus service during twenty-four hours of every day of the week, including Sundays and holidays.

Said Ambassador bridge was open to traffic in the year 1929, and said tunnel was open to traffic in the year 1930. At about the time of the opening of said Ambassador bridge, the collector of Customs, or one of his deputies issued instructions that thereafter the customary working hours of Customs inspectors at the port of Detroit, would be any eight hour period of any twenty-four hours of any day during the week, including Sundays and holidays, and thereafter during the period of time covered by plaintiff's claim,

plaintiff was not paid for the said services so performed by him at night time and on Sundays and holidays.

(9) The customary working hours at the port of Detroit were then and now are from eight o'clock antemeridian until five o'clock postmeridian during week days, and such customary hours did not then nor do they now include Sundays or holidays or night time services as defined by said Act, and the instructions so issued by the said collector of Customs, or his deputy, were contrary to the provisions of said Act of Congress of February 7th, 1920 (41 Stat. L. 402).

(10) No action has been taken with respect to plaintiff's claim by Congress and no application has been made to Congress
68 for consideration of plaintiff's claim. The Customs inspectors at the port of the city of Detroit, Michigan, who performed similar night time, Sunday and holiday services, appointed an overtime committee to present the claims of plaintiff and other such Customs inspectors to the proper authorities and department. That committee filed with the collector of Customs, of Detroit, Michigan, a letter outlining their claims with a brief attached supporting their contention. At the request of the collector of Customs at Detroit, Michigan, said letter and brief were transmitted to the controller of United States and to the Commissioner of Customs, and to the Secretary of the Treasury. By letter bearing date of November 4th, 1936, to the collector of Customs at Detroit, Michigan, the Secretary of the Treasury declined to honor claims for such services.

(11) No assignment or transfer of plaintiff's claim or of any part thereof or interest therein has been made and no person other than the plaintiff is the owner thereof or interested therein.

(12) The plaintiff is justly entitled to recover from the United States for said services the said sum of $10,267.68 after allowing all just credits and off-sets.

(13) The said services performed by plaintiff in the month of September 1931, by custom established by the collector of Customs at Detroit, Michigan, were not due and payable until after October 1st, 1931.

(14) Plaintiff believes the facts as stated in this petition to be true.

Wherefore plaintiff prays judgment against the United States for the said sum of $10,267.68.

ROBERT M. DRYSDALE,
Attorney of Record for Plaintiff.

Business Address: 1538 Dime Bank Building, Detroit, Michigan.

69 [*Duly sworn to by Robert M. Drysdale; jurat omitted in printing.*]

Exhibit A to amended petition

Inspector—GEORGE H. SPITZ

Inclusive dates		Annual rate of pay	Percent off for economy	Detroit and Windsor Ferry		Walkerville Ferry		Detroit and Canada Tunnel		Ambassador Bridge		M. C. R. R. Tunnel		Wabash Ferries (night)	P. M. Ry. Ferries (night)
From	To—			Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday	Night	Sunday, holiday		
12/1/33	3/31/33	$2,100						$728.75	$116.60						
4/1/33	5/2/33	"	15					128.85	19.82						
5/3/33	6/25/33	"	15									$297.32	$59.46		
6/26/33	8/6/33	"	15	$200.69	$29.73										
8/3/33	8/5/33	"	15												$9.91
8/7/33	12/13/33	"	15											$509.84	
October 1933		"	15												12.39
12/29/33	1/31/34	"	15									178.39	29.73		
2/1/34	6/30/34	"	10									923.45	83.96		
7/1/34	11/30/34	"	5									653.53	96.67		
12/31/34	2/27/35	"	5					290.31	77.54						
2/28/35	3/31/35	"	5											177.29	
4/1/35	6/19/35	"												446.06	
May 1935		"													11.66
6/26/35	7/9/35	"		128.26											
8/17/35	9/24/35	"										244.86	64.46		
10/14/35	11/26/35	"						314.82	69.96						
1/2/36	4/22/36	"										1,025.08	116.60		
4/24/36	5/24/36	"						198.22	34.98						
5/25/36	7/18/36	"		250.74	81.62										
1/1/37	6/26/37	"								$361.50	$209.88				
July and August 1937		"													104.94
July and August 1937		"												172.06	
Total Sundays, holidays.					111.35				318.90		209.88		450.88		
Total night				579.69				1,630.95		361.50		3,323.63		1,395.25	138.90

Total Sunday and holiday amounts	$1,091.01
Total night amounts	7,429.92
Total	8,520.93
To equalize the amount due as per proofs	1,746.75
Grand total	$10,267.68

73 *XI. General traverse to the amended petition*

Filed Sept. 3, 1941

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

(Sgd.) FRANCIS M. SHEA,
Assistant Attorney General.

OK J. F. S.
S. J. K.

XII. Final argument and submission of cases

On December 8, 1942, the argument and submission of cases on merits was begun by Mr. R. M. Drysdale for plaintiffs.

On December 9, 1942, the argument and submission of cases on merits was concluded by Mr. R. M. Drysdale for plaintiffs, and by Mr. J. Frank Staley for defendant.

75 *XIII. Special findings of fact, conclusion of law, opinion of the court by Whaley, Ch. J., and concurring opinion in part and dissenting opinion in part by Madden, J.:*

Filed February 1, 1943

Mr. Robert M. Drysdale for the plaintiffs.

Mr. J. Frank Staley, with whom was Mr. Assistant Attorney General Francis M. Shea, for the defendant. Mr. Sidney J. Kaplan was on the briefs.

These cases having been heard by the Court of Claims, the court, upon the evidence, and the report of a commissioner, makes the following:

76 *Special findings of fact*

1. Each of the plaintiffs is a citizen of the United States and resident of the State of Michigan.

2. Each of the plaintiffs was a customs inspector at the port of Detroit September 1, 1931, to August 31, 1937, during which period the base salary of an inspector was $2,100 per annum, which, except as diminished by the Economy Act of June 30, 1932, 47 Stat. 382, he has received.

3. At the port of Detroit, there were at all times herein involved the following stations where customs inspectors rendered services with respect to goods, merchandise, passengers and bag-

gage arriving and departing on, over, or under the Detroit River, to wit:

Detroit and Windsor Ferry
Walkerville Ferry
Detroit and Canada Tunnel
Ambassador Bridge
Michigan Central Tunnel
Wabash Railway Ferries
Pere Marquette Railway Ferries
Grand Trunk Railway Slip Dock

At all times herein involved the Detroit and Windsor Ferry was an international line of ferry boats operating between Windsor, Ontario, Canada, and Detroit, Michigan, continuously from 5 a. m. until 2 a. m. of the following day. Services rendered by customs inspectors at this station consisted of inspection of pedestrians and vehicular traffic, commercial busses, and commercial importations arriving from Canada; inspection of merchandise brought in by pedestrians, automobile or truck, including passengers' baggage; examination of goods entering in bond for transportation through the United States and of goods for exportation to foreign countries, with benefit of drawback or otherwise.

The Walkerville Ferry was an international line of ferry boats operating daily from 5:30 a. m. to 2 a. m. of the following day between Walkerville, Ontario, and the port of Detroit. Inspectors performed services at this station identical with those performed at the Detroit and Windsor Ferry station with the exception that no commercial busses crossed on the Walkerville Ferry boats.

77 The Detroit and Canada Tunnel, opened to traffic November 3, 1930, was a tube under the Detroit River connecting Windsor and Detroit, through which passed vehicular traffic carrying passengers and merchandise. Services by inspectors included all those performed at the Walkerville Ferry station and in addition thereto inspection of passengers and their baggage carried by a line of commercial busses operated through the tunnel by the Detroit and Canada Tunnel Company. The tunnel never closed and traffic through it was continuous twenty-four hours per day.

The Ambassador Bridge, opened to traffic November 15, 1929, was a bridge over the Detroit River, connecting Sandwich, Ontario, and Detroit. Traffic was continuous for twenty-four hours per day and included foot passengers, vehicular traffic, commercial trucks and busses. Services performed by customs inspectors were identical with those performed at the Detroit and Windsor Ferry station.

performed on Sundays or holidays. The inspectors had an eight-hour day and a 56-hour week.

This practice, however, did not wholly prevail at the Michigan Central Railway, where for certain periods prior to November 15, 1929, excess pay was not allowed for daytime service on Sundays or holidays.

6. Upon the opening of the Ambassador Bridge November 15, 1929, there was a change in practice at the port of Detroit.

At the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge, and the freight yard of the Michigan Central Railway, the customs inspectors were given an eight-hour day and a 48-hour week.

Excess pay was discontinued for daytime service performed
79 on Sundays or holidays, within the 48-hour week. No excess pay was given for nighttime service performed Sundays, holidays, or weekdays, within the 48-hour week.

At the Michigan Central Railway passenger station and the Wabash Railway and Pere Marquette Railway ferries, and the Grand Trunk Railway Slip Dock the hours continued as before, with an eight-hour day and a 56-hour week. Excess pay was continued at these last four places for daytime service performed on Sundays and holidays, even though within the 56-hour limit, but no excess pay was given for nighttime service there on Sundays, holidays, or weekdays, performed within the 56-hour period.

After March 3, 1931, the date of going into effect of the Saturday half-holiday for Federal employees, the hours of employment per week were reduced to 44 at the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge and the freight yard of the Michigan Central Railway, and to 52 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries, and at the Grand Trunk Railway Slip Dock, with conditions of excess pay as before but within and based upon the new period of 44 hours. Pay in excess of their annual salaries was given to inspectors for time served in excess of 44 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries and at the Grand Trunk Railway Slip Dock notwithstanding the 52-hour week.

During the period for which claims are being made, viz, September 1, 1931, to August 31, 1937, excess pay given to the inspectors had first been collected by the Collector of Customs from the carrier concerned, and by the Collector remitted to the inspectors by check on the fund so collected. The carriers, so collected from, filed bond securing such collections, under a permit

which was given to them by the Collector on application for the service desired.

Whether and in what amount under the bond and permit system moneys should be collected from the carrier concerned
80 for the payment of compensation to the inspectors was determined by their official superiors, and was not within the control of the inspectors.

7. Plaintiffs' claims are confined (1) to service performed at nighttime on weekdays, Sundays, and holidays, and (2) to service performed in the daytime on Sundays and holidays, in both instances within a regular tour of duty of 44 hours per week.

All service was performed in line of duty, as assigned and directed by their superiors, and all payments of excess pay were made on vouchers prepared at the direction of the inspectors' superiors in office and given to the inspectors for them to sign before payment.

8. Howard C. Myers, No. 43671.—Plaintiff Howard C. Myers was appointed inspector in the customs service May 28, 1930, and for the period September 1, 1931, to August 31, 1937, performed certain services at the Detroit port in daytime on Sundays or holidays, or at nighttime on Sundays, holidays, or weekdays that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100 is $13,759.41, which the plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein plaintiff did not work because of such work in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, is $6,469.93, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $13,759.41.

During the period of this claim, viz. September 1, 1931, to August 31, 1937, the plaintiff also performed service in excess of 44 hours per week at the Wabash Railway and Pere Marquette Railway ferries, for which he received $691.76 excess pay.

The regular tour of duty at these stations was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the carriers concerned.

This item of $691.76 is not sued for herein.

81 9. John H. Arble, No. 43672.—Plaintiff John H. Arble received appointment in the customs service July 1, 1930, and during the period September 1, 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays, or at nighttime on Sundays, holidays, or week-

days, that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100, is $10,219.23, which plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays, wherein plaintiff did not work because of such work in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, is $1,972.76, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $10,219.23.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Grand Trunk Railway Slip Dock for which he received $124.20 excess pay.

The regular tour of duty at this dock was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Grand Trunk Railway.

This item of $124.20 is not sued for herein.

10. Charles C. Martin, No. 43673.—Plaintiff Charles C. Martin received appointment into the customs service November 4, 1929, and during the period September 1, 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100, is $12,225.32, which the plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein
82 plaintiff did not work because of such work in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, is $5,650.44, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $12,225.32.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Wabash Railway and Pere Marquette Railway ferries and the Grand Trunk Railway Slip Dock for which he received $888.50 excess pay.

The regular tour of duty at the Wabash Railway and Pere Marquette Railway ferries and at the Grand Trunk Railway Slip Dock was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him

for that purpose from the Wabash Railway, Pere Marquette Railway, and Grand Trunk Railway.

This item of $888.50 is not sued for herein.

During the period of this claim plaintiff Charles C. Martin also performed services in excess of 44 hours per week at the Detroit and Windsor Ferry for which he received $45.77 excess pay.

The regular tour of duty at this station was 44 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Detroit and Windsor Ferry.

This item of $45.77 is not sued for herein.

11. Walter O. Plitz, No. 43674.—Plaintiff Walter O. Plitz received appointment into the customs service October 20, 1930, and during the period September 1; 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100; is $12,277.94, which plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein plaintiff did not work because of such work in daytime on Sundays or holidays or at nighttime on Sundays, holi-
83 days, or weekdays, is $5,833.55, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $12,277.94.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Pere Marquette Railway and Wabash Railway ferries, for which he received $442.78 excess pay.

The regular tour of duty at the Pere Marquette Railway and Wabash Railway ferries was 52 hours per week. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Pere Marquette Railway and the Wabash Railway.

This item of $442.78 is not sued for herein.

12. George H. Spitz, No. 43675.—Plaintiff George H. Spitz received his appointment into the customs service in November of 1929 and during the period September 1, 1931, to August 31, 1937, performed certain services at the port of Detroit in daytime on Sundays or holidays or at nighttime on Sundays, holidays, or weekdays, that were not in excess of 44 hours per week. Excess pay for such services calculated under section 5 of the act of February 13, 1911, 36 Stat. 901, as amended, construed as allowing the named rates as additions to the annual base salary of $2,100,

is $10,267.68, which plaintiff claims and has not been paid. The annual base salary, apportioned to the daytime of weekdays wherein plaintiff did not work because of such work in daytime on Sundays, holidays, or at nighttime on Sundays, holidays, or weekdays, is $4,759.52, which the defendant asserts as recoverable from the plaintiff in the event that plaintiff is adjudged entitled to recover of the defendant pay of $10,267.68.

During the period of this claim, viz, September 1, 1931, to August 31, 1937, the plaintiff also performed services in excess of 44 hours per week at the Wabash Railway and Pere Marquette Railway ferries, for which he received $399.13 excess pay.

The regular tour of duty at the Wabash Railway and Pere Marquette Railway ferries was 52 hours per week. The
84 excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Pere Marquette Railway and Wabash Railway.

This item of $399.13 is not sued for herein.

During the period of this claim plaintiff also performed services in excess of 44 hours per week at the Michigan Central Railway Freight Yard or Passenger Station, for which he received $346.92 excess pay.

The regular tour of duty at the freight yard was 44 hours per week, at the passenger station 52 hours per week. It does not appear how the services were divided, if at all, between these two places. The excess over 44 hours was paid for by the port Collector of Customs from funds collected by him for that purpose from the Michigan Central Railway.

This item of $346.92 is not sued for herein.

13. The amounts sued for herein by the respective plaintiffs have not been collected in whole or in part from the several carriers concerned by plaintiffs or defendant.

Conclusion of law

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiff Howard C. Myers is entitled to recover $13,759.41; plaintiff John H. Arble is entitled to recover $10,219.23; plaintiff Charles C. Martin is entitled to recover $12,225.32; plaintiff Walter O. Plitz is entitled to recover $12,277.94; and plaintiff George H. Spitz is entitled to recover $10,267.68.

It is therefore adjudged and ordered that plaintiff Howard C. Myers recover of and from the United States the sum of thirteen thousand seven hundred fifty-nine dollars and forty-one cents ($13,759.41); plaintiff John H. Arble recover of and from the United States the sum of ten thousand two hundred nineteen dollars and twenty-three cents ($10,219.23); plaintiff Charles C.

Martin recover of and from the United States the sum of twelve thousand two hundred twenty-five dollars and thirty-two cents ($12,225.32); plaintiff Walter O. Plitz recover of and from the United States twelve thousand two hundred seventy-seven
85 dollars and ninety-four cents ($12,277.94); and plaintiff George H. Spitz recover of and from the United States the sum of ten thousand two hundred sixty-seven dollars and sixty-eight cents ($10,267.68).

Opinion

WHALEY, *Chief Justice*, delivered the opinion of the court:

The sole question in these cases is the liability of the United States for extra compensation for services rendered at night, on Sundays or holidays by customs inspectors at the port of Detroit, Michigan. No claim is made for extra pay for any work other than the regular tours of service of eight hours during the twenty-four hours of any day. The parties have stipulated that the five cases in suit (Nos. 43671, 43672, 43673, 43674, and 43675] shall serve as test cases for the determination of twenty-two other suits by customs inspectors at the port of Detroit to recover extra compensation.

Plaintiffs' claims are based on section 5 of the act of February 13, 1911, 36 Stat. 901, as amended by the act of February 7, 1920, 41 Stat. 402, and sections 450, 451, 452, and 401 of the Tariff Act of 1930, 46 Stat. 590.

The solution of the question involves an interpretation of the section of the Act of 1911, as amended, which reads as follows:

"SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for
86 Sunday or holiday duty. The said extra compensation

shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided; the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: Provided further, That in those ports when customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees on the overtime pay herein fixed."

The plaintiffs performed services at night, or on Sundays or holidays, at the port of Detroit where goods, merchandise, passengers, and baggage arrived from or entered Canada on, over, and under the Detroit River by way of ferries, tunnels, and a bridge.

Extra compensation is claimed for night services at all stations and for Sunday or holiday services at the ferries, tunnels, and bridge.

At one of the tunnels extra compensation was paid for Sunday or holiday services. Plaintiffs performed at all the stations herein involved services at night, or on Sundays or holidays, in connection with the lading and unlading of cargo or the lading of cargo or mercandise for transportation in bond, or for exportation in bond or for exportation with benefit of draw-
87 back, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examinatinn of passengers' baggage. Only eight-hour periods of the twenty-four hours of any day, including Sundays or holidays, were performed. There is no claim made for any excess of time over eight hours.

Before November 15, 1929, when the Ambassador Bridge was opened, customs officers and employees at the port of Detroit were paid at all stations extra compensation for Sunday or holiday services. After the opening of the Bridge the collector of customs stopped payment of extra compensation for Sunday or holiday services at the ferries and tunnels and substituted therefor the practice of giving compensatory time off at a later date. No extra compensation for Sunday or holiday duty was made at the Ambassador Bridge or the Detroit and Canada Tunnel but compensatory time off was granted.

There is no difference between a ferry, a bridge, and a tunnel as a means of conveyance of persons, baggage, or freight from one side of a river to another. All accomplish the same purpose. The Tariff Act of 1930, Sec. 401, 46 Stat. 708, defines a vehicle in the following language:

"The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."

This is a very broad and comprehensive definition. It was necessary to have inspectors of Customs at these bridges and tunnels during the hours they were open for use just as much as it was necessary to have them upon arrival of ferries or vessels. Dutiable articles could be brought in over the bridges and tunnels just as well as by vessel. Persons entering the country could come in over these fixed structures just as easy as by ship. These structures had to be guarded and the articles inspected. It was encumbent upon the defendant to furnish the inspectors whether the bridges and tunnels were privately or publicly owned. A bond could have been required and exacted by the Government to pay for the extra time service.

88 Section 5 of the act of 1911, as amended by the act of 1920, is not ambiguous but plain and clear. It not only provides extra compensation for overtime services of customs officers and employees who are required to perform services after five o'clock P. M. and before eight o'clock A. M. (defined in the act as "night" service) or Sundays or holidays but it definitely states the basis of the compensation of those who work between five o'clock postmeridian and eight o'clock antemeridian not to exceed two and one-half days' full pay and for the services on Sundays or holidays not to exceed two additional days' pay.

Plaintiffs were on a yearly salary of $2,100 and were on duty after five o'clock postmeridian and before eight o'clock antemeridian or on Sundays or holidays.

It is contended that overtime means only "extension of work hours above eight hours in twenty-four" but there is nothing in the act to this effect. On the contrary, the act plainly states that

the services rendered after five o'clock in the afternoon and before eight o'clock in the morning or on Sundays or holidays shall be "overtime."

In Ferguson v. Port Huron & Sarnia Ferry Co., 13 Fed. (2d) 489, 492, in considering the provisions of section 5, the court held:

"* * * The term 'overtime' appropriately expresses the meaning, and in my opinion was intended to express such meaning: 'Beyond the regular, fixed working hours.' The word 'remain,' in the clause referring to officers required to 'remain on duty between the hours' mentioned, means, according to its proper interpretation, 'remain on duty after reporting for such duty.' The section itself provides that 'such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual' work contemplated 'takes place or not.' As was pointed out by the Supreme Court in its opinion in International Railway Co. v. Davidson, 257 U. S. 506, 42 S. Ct. 179, 66 L. Ed. 341: 'This * * * section defines what shall be deemed overtime.' The only definition thus employed was the reference to the period of time between the particular hours specified, without regard to the question whether the services rendered 'at night' or 'on Sundays or holidays' immediately and continuously followed services just completed for regular pay. Clearly, the object of the statute was to facilitate lading and unlading 'at night' and on Sundays and holidays, irrespective of whether the officers working in connection therewith had previously worked during the regular hours of the immediately preceding regular working 'day.'".

It is contended by the defendant that the portion of the section which reads:

"* * * The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury * * *"

imposes the liability on the carrier and that, unless work is performed under a special license granted by the collector, no extra compensation accrues and nothing can be paid.

Section 451 of the Tariff Act of 1930, 46 Stat. 715, requires that before a special license to unlade can be granted to the master, owner, or agent, a bond in the penal sum to be fixed by the col-

lector to be given "conditioned to indemnify the United States for any loss or liability" which might occur. Section 452 of the same act requires a special license to lade at night or on Sunday or holidays.

The bond required is to "indemnify" the United States for the extra compensation which has to be paid the customs officers and employees who perform duties for which the license is given and which required the services to be rendered at night or on Sundays or holidays.

These customs officers and employees were employed by and received their compensation from the collector acting for the United States. Under the act of March 3, 1917, c. 163, § 1, 39 Stat. 1106, they could not receive their pay for services from any private source. Customs officials especially are forbidden to receive such payment. Revised Statutes, § 1790. Payment had to be made by the Government through the collector and the
90 extra compensation to the inspectors had to come out of the funds of the Government and the Government was liable for the extra compensation. The failure by the Government to collect from the carrier would not relieve it of liability for the extra pay for services during the periods under the statute.

It is contended by the defendant that the proviso of this section gives the collector full authority to require customs officers and employees to work at night or on Sundays or holidays without extra compensation. The proviso reads as follows:

"Provided further, That in those ports where customary working hours are other than these hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

It will be seen that the latter part of the proviso prohibits alteration of the length of a working day of customs employees or overtime pay fixed in the statute. The plain intent of the proviso is to permit collectors of customs at ports where longshoremen and others are accustomed to begin work earlier or later than the hour fixed by the section, to adjust the customs employees' working day to correspond with the customary daylight working period at a certain designated port. In other words, the collector could allow the inspectors to work from 7:00 A. M. to 4:00 P. M. instead of from 8:00 A. M. to 5:00 P. M. because at a particular port it was the custom of the longshoremen to work these particular

hours. It specifically states that this arrangement to a custom of a port shall not affect or alter the length of a working day for customs employees or the overtime pay fixed therein.

We do not think it necessary to go into an extensive discussion of the contention of the defendant that Congress gave legislative approval to the system of compensation and working hours adopted by the collector of customs at the port of Detroit by the passage of the Appropriation and Tariff Acts of 1922 and
91 1930 and by the insertion at the end of section 451 of the Act of 1938, 52 Stat. 1082, of the following provision:

"Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign Customs officers or employees to regular tours of duty at night or on Sundays or holidays when such assignments are in the public interest. * * *"

There is no denial of the fact that the Treasury Department has the right to assign the customs officers and employees to regular hours of duty during any eight-hour period of the twenty-four hours of a day. However, there is nothing under this provision which restricts or qualifies the right of the customs officers and employees to extra compensation as provided by law for services rendered at night, or on Sundays or holidays.

It is our conclusion that plaintiffs have the right to extra compensation as fixed by section 5 of the Act of 1911, as amended by the act of 1920, for services performed between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, and the defendant is liable for such extra compensation. This is in addition to the base pay which plaintiffs have been paid.

This court can only construe the statute as it is written by the lawmaking body. It cannot indulge in judicial legislation. If the amounts granted as overtime are apparently excessive as compared with those allowed in other occupations, Congress alone can apply the remedy.

Plaintiffs are entitled to recover as follows:

No. 43671. Howard C. Myers	$13,759.41
No. 43672. John H. Arble	10,219.23
No. 43673. Charles C. Martin	12,227.32
No. 43674. Walter O. Plitz	12,277.94
No. 43675. George H. Spitz	10,267.68

It is so ordered.

JONES, Judge; and LITTLETON, Judge, concur.

WHITAKER, Judge, took no part in the decision of this case.

Separate opinion

MADDEN, Judge, concurring in part and dissenting in part:

I agree with the opinion of the court that the word "overtime," as used in the applicable statute, means, contrary to
92 its ordinary meaning, work done outside the hours mentioned in the statute, and on Sundays and holidays, even though some or all of the time so designated as "overtime" falls within the regular daily or weekly working period of the employee who claims extra pay for the "overtime." It follows that so much of the work as is really covered by the statute must be paid for at the statutory rate. I agree also that the Government's failure to collect the amount of its extra expense from the railroads and ferry companies is no answer to the demand of plaintiffs that they be paid the statutory compensation. I disagree, however, with the application of the statute relating to extra compensation to the customs employees at the Ambassador Bridge and the Detroit and Canada Tunnel, and think that the judgments should be reduced to whatever extent they include extra compensation for such services.

The language of the statute, Section 5 of the act of February 13, 1911 (36 Stat. 901), as amended by the act of February 7, 1920 (41 Stat. 402; 19 U. S. C. 267), which is made a part of the Tariff Act of 1930 by reference, shows that the extra compensation to be paid to customs employees was to be collectible from those who used the extra service. The statute says: "The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees. * * *."

The legislative history of the statute is to the same effect. At the hearings before the Committee on Ways and Means on H. R. 9525 (61st Congress, 2nd Sess.), the companion bill of S. 6011, which became the act of February 13, 1911, several colloquies occurred, in each of which assurance was given that the statute was to be administered without cost to the Government. See pages 462, 463, 464, 470 of the hearings. The Report of the Committee on Ways and Means on S. 6011 recommended passage with the following amendment: "the said extra compensation to be paid by the master, owner, agent, or consignee of such vessels." The amendment was adopted.

93 Plaintiffs do not urge that the 1920 amendment of the act of 1911 changed the meaning of the act in this respect. They urge rather that all of the extra compensation for which they sue has been collectible from the users of the service, and that the Government has, by its own negligence, failed to collect the extra compensation from the users of the service, though it has had the legal right to collect it. In effect, then, we are asked by plaintiffs to decide not only that customs employees who rendered the services which they rendered, are entitled to collect extra compensation from the Government at the rate fixed in Section 5, but that the users of such services should have, in the past, and should in the future, apply for and take out a special license or permit pursuant to Section 451 of the Tariff Act of 1930 (46 Stat. 708, 715; 19 U. S. C. 1451), giving bond to indemnify the United States for any loss or liability which might result from the special license or permit, and to pay the extra compensation to the employees.

Among the services sued for by plaintiffs were those at the Ambassador Bridge, which spanned the Detroit River, connecting Detroit and Sandwich, Ontario. We have found that over this bridge, "Traffic was continuous for twenty-four hours per day and included foot passengers, vehicular traffic, commercial trucks and busses." In my opinion, the statutes do not require the Government to impose upon a pedestrian who walks across the bridge between five o'clock in the afternoon and eight o'clock in the morning, the duty of applying for a permit and giving a bond to pay the extra compensation of customs employees. The pedestrian might well point to the statute, which speaks of a "vessel or vehicle" (Tariff Act of 1930, Section 451, 46 Stat. 708, 715), and urge that even the broad definition of vehicle which appears in Section 401 of that act does not include his means of locomotion. Private automobiles also cross the bridge. I do not believe that Congress intended that each person who drives his automobile or truck across the bridge should have to apply for a permit or license and give a bond to pay for his small portion of extra compensation of customs employees.

Plaintiffs, apparently recognizing that such a construction of the statutes would, in effect, close the bridge to pri-
94 vate traffic from five o'clock in the afternoon until eight o'clock in the morning, and largely destroy its usefulness, do not urge that this burden should be imposed upon such users. They urge rather that the owner of the bridge should be the one who should apply for the permit, give the bond, and pay for the extra compensation of the customs employees. This would be a less inconvenient solution of the problem, but the statutes do not seem to me to permit it. Section 401 (b) of the Tariff Act

of 1930 defines a vehicle, for the purpose here in question, as follows:

"The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft."

I do not think a bridge is a vehicle, within either the ordinary or this statutory definition of that word, any more than a road is a vehicle. Since the duty is imposed upon the "master, owner, or agent, of such vessel or vehicle" (Tariff Act of 1930, Sec. 451, 46 Stat. 708, 715), it does not fall upon the owner of the bridge, unless, as plaintiff urges, as an agent of the customers of his bridge. In the case of the pedestrians, we need not inquire into the question of agency, since no vehicle is involved at all whose owner might be represented by an agent. In the case of the private automobile or truck, I do not see how the collection of a bridge toll from its owner or driver constitutes the owner of the bridge the agent of the owner or driver with reference to customs, if any, collectible upon his load or baggage, if any. Plaintiff urges that the provisions of Section 453 of the Tariff Act of 1930 (46 Stat. 708, 716), imposing a penalty for unlading without a special permit upon, inter alia, "every other person who knowingly is concerned, or who aids therein," of the value of the merchandise or baggage, and, in some cases, of the forfeiture of the vessel or vehicle, make the owner of the bridge an agent of his customer for the purpose of obtaining a special license and giving bond. This section does not, by imposing a penalty upon one who comes within its definition, make such a person the agent of another for the purpose of applying for a license or giving a bond for him.

Besides, one who permits another to walk across his toll
95 bridge or drive his automobile across it, is not "knowingly concerned" with the others unlading a vehicle without a license, when the other has no vehicle, or if he has one, it is no concern of the bridge owner whether he has or has not anything in it to unlade.

I would conclude from the foregoing that, with reference to what is probably the larger part of the traffic across the Ambassador Bridge, the statutes here in question have no bearing upon it. If the customs authorities are willing to permit entry of such traffic into the United States at this point during any hour of the day, they may do so, but the statutes, in my opinion, give them no power to impose special requirements upon such users of the bridge. And I have grave doubts as to whether they have the power to impose such requirements upon public busses and trucks, since the port is not kept open for their convenience and no extra expense is usually incurred in order to

serve them. Certainly the whole of the cost, outside the hours from 8 A. M. to 5 P. M., could not be imposed upon the few public conveyances that might enter during that time, when in fact the entry is kept open for public convenience to accommodate the much greater number of other persons to whom the statutes relating to special licenses and bonds and payment of extra compensation have, as I think, no application.

What I have said about the Ambassador Bridge is applicable also to the Detroit and Canada Tunnel. A tunnel is not a vehicle and the statute relating to extra compensation does not, I think, apply to it.

If, by what I regard as a strained construction of the word "vehicle," or the word "agent," as used in the statutes, we hold that the Government may collect from the Bridge Company or the Tunnel Company, and therefore must pay its customs employees extra compensation, we have still found no solution for the numerous points of entry where the access to the border is over a free public road. Then there would be no person to whom, by any stretch of interpretation, the extra compensation could be shifted, hence extra compensation would not be payable.

In my opinion, the applicable statute is not one which should receive a strained construction in order to permit plain-
96 tiffs to recover. The public inconvenience of either closing these facilities except for a few hours in the daytime, or else imposing the whole expense of keeping them open upon only a few of those who are accommodated by their being kept open, would be great. As to keeping these facilities open at the public expense, without reimbursement from the users, and paying the employees who work their regular eight hour shift or a part of it, at some time between five P. M. and eight A. M. at the rate of three days pay for one eight hour day's work, or three hours pay for one hour's work, no one contends, I believe, that there is any warrant in the statutes for that. That scale of extra compensation is provided for only in statutes which provide for its reimbursement by the users of the service, and the legislative history shows that it was not intended to be paid when the Government could not recover it. Aside from this section, there is nothing in the statutes to indicate that customs employees are regarded by Congress as being in a different class from other employees of the Government, such as postal employees, who must do their regular day's work at such time of day as the work is needed. It is of interest to note that Congress has provided for extra pay of 10 percent of the regular hourly rate for certain postal employees for work done between

six P. M. and six A. M.[1] It could hardly be supposed that Congress intended that for another class of employees the extra pay, payable out of the public treasury, and without reimbursement to the Government, should be 200 percent instead of 10 percent, for working during the less desirable hours.

97 *XIV. Judgment of the Court*

Feb. 1, 1943

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are entitled to recover.

It is therefore adjudged and ordered that plaintiff Howard C. Myers recover of and from the United States the sum of thirteen thousand seven hundred fifty-nine dollars and forty-one cents ($13,759.41); plaintiff John H. Arble recover of and from the United States the sum of ten thousand two hundred nineteen dollars and twenty-three cents ($10,219.23); plaintiff Charles C. Martin recover of and from the United States the sum of twelve thousand two hundred twenty-five dollars and thirty-two cents ($12,225.32); plaintiff Walter O. Plitz recover of and from the United States twelve thousand two hundred seventy-seven dollars and ninety-four cents ($12,277.94); and plaintiff George H. Spitz recover of and from the United States the sum of ten thousand two hundred sixty-seven dollars and sixty-eight cents ($10,267.68).

99 *XV. Proceedings after judgment*

On March 27, 1943, the defendant filed motions for a new trial.

On April 5, 1943, the court entered the following order on said motions:

ORDER

It is ordered this 5th day of April 1943, that said motions be and the same are overruled.

On May 20, 1943, the defendant filed a request for record in re certiorari under Rule 99-b, together with a motion for an order re compliance therewith, and a notice of intention to file petition for writ of certiorari, and other portions of the record which the defendant deems material to the errors assigned.

[1] Act of May 24, 1928, C. 725, 45 Stat. 725, as amended May 12, 1939, C. 129, 53 Stat. 741, 39 U. S. C. 828.

On May 31, 1943, the plaintiff filed a request for other portions of the record together with the portions deemed material to the errors assigned.

On May 31, 1943, the court filed an order settling the record as follows:

101 *Order of Court settling record*

The defendant having filed a notice of intention to file a petition for writ of certiorari to the Supreme Court in the above-entitled case, and both the defendant and plaintiff having requested that certain portions of the evidence which are attached hereto be included in the record to be certified to the Supreme Court, and the court having found that both portions are accurate transcripts of the original record material to the errors assigned, the same are hereby this 31st day of May 1943, approved as the record to be certified to the Supreme Court.

By the Court

RICHARD S. WHALEY,
Chief Justice.

103 *Portions of the record which defendant deems material to the errors assigned*

JOHN H. ARBLE (plaintiff)

Page 2.

Q. Give the reporter your name.

A. John H. Arble.

Q. Age?

A. Thirty-four years.

Page 3.

Q. When were you appointed a customs inspector?

A. July 1st, 1930.

Page 7.

Q. Was there continuous traffic over the bridge [Ambassador] during this time?

A. It has never been closed since opened.

Q. What was the nature of the traffic over that bridge?

A. Foot passengers, vehicular traffic, commercial trucks, commercial buses.

Q. Merchandise come over?

A. Yes, sir.

Q. What is the Michigan Central Tunnel?

A. It is a railway tube under the Detroit River between Windsor, Ontario, and Detroit.

Q. Has that ever been closed?

A. It has never been closed except by a wreck, but it has never been closed officially to business.

Page 8.

Q. What do you mean by the Wabash Ferries?

A. Wabash ferries are international freight-car ferries plying between Windsor, Ontario, and Detroit, Michigan, owned or operated by the Wabash Railway Company.

Q. Do they carry freight only?

A. In the beginning of this particular period of time there were some passenger traffic and passenger cars came across, but since then it has been discontinued and nothing but freight——

Mr. STALEY. That is all carried in railroad cars?

A. Yes, sir; either passenger or freight cars loading on the boat.

Q. There is no vehicular traffic, so called, on that ferry? Just freight cars? I mean just railway cars?

A. That's right.

104 Q. Was that operated day and night?

A. Yes, sir.

Q. Did it require continual service for twenty-four hours?

A. There are some periods of time that any particular vessel was tied up at the dock——

Q. What do you mean by P. M. Railway Ferry?

A. Abbreviation for Pere Marquette, international boats plying between Windsor and Detroit, hauling freight in cars.

Q. Would those ferries carry passengers—the P. M.?

A. Not during the period of time represented in this petition.

Q. What do you mean by Grand Trunk Railway Slip Dock?

A. Grand Trunk Railway Slip Dock is the termination point for the tie-up for boats arriving in Detroit from Windsor on the Grand Trunk Railway.

Q. Those boats would carry what?

A. Both passenger trains and freight trains.

Q. But the traffic would come over in railway cars?

A. Right.

Page 13.

Q. Now let us go to the Michigan Central Tunnel; describe the services performed at that tunnel by you during this period during the night time and on Sundays and holidays?

A. The services in connection with the lading and unlading of merchandise; services in connection with the transportation in bond of merchandise; transportation and exportation in bond and exportation of merchandise for the benefit of drawback.

Q. Did the Michigan Central have two stations served by Detroit customs inspectors?

A. Yes, sir.

Q. One was at a freight station, was it?

A. One was in the freight yards for freight work.

Q. And the passenger station the other?

A. Yes, sir; approximately nine hundred to a thousand feet apart in a direct line.

* * * * *

Q. Did they pay this overtime for the passenger service?

A. They did for Sundays and holidays.

Mr. STALEY. During this period of time involved in your action?

A. Yes, sir; they did.

105 The COURT. Who do you mean?

A. The Michigan Central Railway reimbursed the customs cashier who in turn issues a voucher to the customs inspectors.

Page 21.

Q. Mr. Arble, what were the customary working hours of customs employees at the port of Detroit during the time covered by your bill?

Mr. STALEY. I object to the question. The witness can tell what hours were worked by customs employees, but what is customary——

By the COURT. Was there such a thing as customary working hours at the port of Detroit or did you work during hours that they told you to work?

A. Worked the hours you were assigned.

The COURT. And one hour was just as customary as another that you were assigned to?

A. Yes, sir; if you could keep awake.

Page 28.

Q. And your eight-hour tour of duty since your appointment has included any hours of the day?

A. Yes, sir.

Q. And the same on Sundays and Saturdays and holidays your tour of duty has included any hour of the day?

A. Anything within the twenty-four.

Q. And at the time you were appointed hadn't that system of twenty-four hour customs service in this district been established?

A. I do not know when that was established.

Q. Well I am asking you when you were appointed wasn't that —hadn't that been established?

A. When I went to work that was the customary procedure.

Q. That is that they provided a full customs service for twenty four hours each day?

A. Yes, sir.

Q. And they provided that twenty-four hour service seven days in the week?

A. I went to work at the bridge and it has never been closed.

Q. I mean that twenty-four hour service was then provided for each day of the week?

A. It was provided at the bridge at that time and it has never been discontinued twenty-four hours a day; that is before I went to work.

106 Q. And with regard to the individual customs inspector it was divided into a shift of eight hours so that there were three duty shifts of eight hours each in every day?

A. Yes, sir.

Q. And those hours have been the prevailing working hours for customs inspectors during the entire time you have been in the service?

Mr. DRYSDALE. I object to the form of that question—"prevailing working hours." There are no prevailing working hours.

The COURT. You mean eight hours.

Q. Eight hours assigned to any period of the twenty-four?

A. Eight hours is the prevailing working time for any one inspectors.

Page 122.

Q. During the period of your claim around the Detroit stations, you had during the period either a forty-four or a forty-eight hour week as the basic week?

A. Yes, sir.

Q. And during the time you were actually paid for a forty-four or a forty-eight hour week?

A. I worked those hours and received the base pay.

Q. What I am getting at is this: maybe it will clarify it just a little. Say your week began on a Wednesday, and your tour of duty included a Sunday——

A. Yes, sir.

Q. Now for that week it would be counted as forty-four or forty-eight hours, and you would be paid on the base pay for the full week; I mean you got your compensation for Sunday and holidays or after 5:00 o'clock on the base pay basis?

A. The question is confusing.

Q. Well maybe it is. You worked on say a particular Sunday?

A. Worked on Sunday; yes.

Q. You were paid the base pay for that Sunday?

A. I was paid monthly, paid $175.00 a month, twice a month.

Q. But in order to get that you must have performed a service of forty-four or forty-eight hours a week?

A. I averaged forty-eight and forty-four hours a week.

Q. Depending on——

A. At all stations in Detroit; yes, sir.

Q. But the Sunday work which you performed was necessary in order to have the forty-eight hour week?

A. To comp[illegible] that amount of time; yes, sir.

107 Q. And you were paid on the forty-eight hour week basis?

A. I was paid the regular base pay.

Q. Which would be for a forty-eight hour week?

A. I would presume so.

Q. And if you didn't work forty-eight hours you wouldn't get your full basic pay?

A. Except at vacation periods.

Q. I mean the regular——

A. Yes, sir.

Q. Your regular week was a forty-eight or a forty-four hour week?

A. Yes, sir; regular tour of duty.

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Page 54.

Q. During the time involved in the plaintiff's suits here, namely, from 1931 to 1937, at what stations in Detroit was extra compensation paid for Sunday and holiday service?

A. At the railroad car ferries—all the railroad car ferries, and the passenger station on the Michigan Central Railway.

Pages 81–85.

X Q. And when you joined the service, and ever since, there was the system at Detroit of assigning customs inspectors to regular tour of duty of eight hours each out of every 24 hours, for weekdays, Sundays, and holidays?

A. Yes, sir. There were schedules like that.

X Q. And your claim which you have filed here relates solely to hours of service which you have performed during any such assigned 8-hour daily tour of duty?

A. That is right.

X Q. With respect to this exhibit, Arble R–1, the first column in the body refers to "Number of Permit." Will you please state for the record what that column relates to?

A. I am not familiar with that column.

X Q. You do not know what that number refers to.

A. I execute no records that have to do with that permit.

X Q. And is it your testimony today that you have no knowledge of what that column is that pay voucher represents? Headed "permit number."

A. I know what it represents; yes, sir.

108 X Q. What does it represent?

A. It represents a permit that is issued to various companies who have posted bonds for the payment of services.

X Q. And are those the permits provided under the same Overtime Compensation Act or its amendments as you now claim are applicable to you?

Mr. DRYSDALE. I object to that, Your Honor, as calling for a conclusion. It has nothing to do with securing the permits.

Mr. STALEY. He has been in the service for several years.

Commissioner HOBBS. I will have to sustain the objection.

By Mr. STALEY:

X Q. Do you know whether or not the services covered by that exhibit were services rendered to carriers, to vessels, or to vessel carriers?

A. It so happens that all entries here are made for work on vessels.

X Q. On vessels?

A. That is right.

X Q. And what vessels? Do the names of the vessels appear?

A. Each respective name is listed here.

X Q. And whose vessels are there? At what station?

A. No; it does not five you any of the details as to what the company is, who——

X Q. Do you know at that stations the services were performed?

A. No; I could not tell you that, at this time, because I do not know where these particular stations or these particular boats were unladen or boarded. It was somewhere in the Detroit River, I know that.

X Q. Are the vessels named, there, vessels passing through the Detroit area, as distinguished from vessels operated by the car ferries or other ferries?

A. Yes; of course.

X Q. Have you examined the records to determine whether or not that particular claim of overtime which that voucher represents is for daily service rendered in excess of your regularly assigned 8-hour tour of duty for that day?

Mr. DRYSDALE. I object to that question, Your Honor. It calls for a conclusion. The exhibit speaks for itself.

Commissioner HOBBS. I overrule the objection.

Mr. STALEY. I have asked him whether he has examined the record to determine.

Commissioner HOBBS. Answer the question.

Mr. STALEY. To determine whether that extra service was in addition to your regular 8-hour assigned tour of duty.

A. I do not gather what you mean by "examining the records." What record would I examine?

By Mr. STALEY:

X Q. You know your records in Detroit give you every day exactly what hours your have served?

A. That is right. You mean the schedules of work?

X Q. Yes.

A. Or the time sheets?

Q. Certainly.

A. That is right.

X Q. Now, have you examined any documents to determine whether or not the services rendered appearing by that exhibit were services rendered during your regularly assig. 8-hour tour of duty for that day, or whether it was in addition to any assigned regular 8-hour tour of duty?

A. I wouldn't have to examine the records. I know definitely that these are for the hours in addition to the scheduled hours.

X Q. For hours in addition to the regular 8-hour assigned tour of duty?

A. That is right. I know that is right. I said that this voucher represented hours for hours in addition to the scheduled hours.

X Q. At Detroit, hasn't it been the practice since your appointment, where overtime compensation accrues, under permits, that such overtime compensation money was paid by the carriers involved to the collector of customs for that district?

A. I could only answer that by hearsay.

Mr. DRYSDALE. I object to it.

Commissioner HOBBS. Naturally, he says he cannot answer it.

By Mr. STALEY:

X Q. Do you state that you do not know definitely one way or the other, here, today?

A. I have never worked in the accounting division of the Customs House.

X Q. That does not answer my question, Mr. Arble. As a member of the committee which investigated these matters, did you have any information on that subect, at all, or do you have today any accurate information on it?

A. I do know what the mechanics are of handling it.

X Q. What are the mechanics?

A. The mechanics are for all companies—the law provides for all companies who request the services of customs officers at nights from the hours from 5 p. m. to 8 a. m., or on Sundays and holidays, before being provided the service of customs officers, of making the request for their services, to put up bond, to post

an indemnity bond with the collector of customs which is certified by the Bureau of Customs as being a responsible bond for the payment or reimbursement of all services performed nights, Sundays, and holidays, by those customs officers.

110 Page 90.

X Q. I am speaking of overtime compensation which has been paid you. Have you examined any records at all to determine exactly whether such overtime compensation was for services in addition to your regular 8-hour assigned tour of duty?

A. Why, I know that it was for services outside my regular scheduled tour of duty, without examining the records.

Page 95.

X Q. Is it your testimony today that you received overtime compensation during any 24 hours, under the permit system, for services rendered during your 8-hour required period of service? That is perfectly clear, I think.

Mr. DRYSDALE. That is right.

By Mr. STALEY:

X Q. Was it beyond the 8-hour period of service, or was it rendered within the 8-hour period of service?

Mr. DRYSDALE. You mean, what we claim, here?

Mr. STALEY. No. I am speaking of these services for which he has received additional compensation under the voucher which he has presented, and which in turn identifies it as being done under permits.

A. The thing is mixed up to me, the issues in both cases. All money I received under permits was in addition to my regular scheduled working hours, on these vouchers.

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R. D. Q. Do you know of any instance—I may have asked it, but I will ask it again—where the services were performed; where overtime compensation was paid, where the carrier was not responsible for such payment? Do you know of any instance where overtime compensation has been paid, where the carrier was not responsible for payment of the compensation?

A. I have no knowledge of it.

R. D. Q. One way or the other?

A. No.

111 BYRON E. REDDICK

Page 52.

Q. Well there is no doubt about it that when the Ambassador Bridge was opened that there was a full twenty-four hour tour of duty established?

A. That is what was established at that time.

Q. Or twenty-four hour service?

A. Yes, sir.

Q. And that the tour of duty of any inspector, regular tour of duty was any eight-hour tour of duty during that period?

A. Yes, sir; the assignment of any eight hours they wished.

Q. And they assigned them to any eight hours the same on Sundays and holidays as they did during the week days?

A. That is correct.

Q. And that continued from that time down to the present?

A. Yes—what was that?

Q. I say that eight-hour tour of duty in that manner has continued from 1929 down to the present?

A. Yes, sir.

112 HOWARD C. MYERS

Page 66.

Q. Mr. Myers, does your claim for overtime cover any other period than an eight-hour tour of duty period, whether it be on a week day, a holiday, or a Sunday?

A. No; it does not.

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Q. But at any rate after you were appointed you did perform regular eight-hour tour of duty?

A. Yes, sir.

Q. With an allocation during any twenty-four hour period?

A. That's right.

Q. And that practice continued from the time of your appointment down to the present time?

A. That's right.

Q. You were appointed after the Ambassador Bridge and the tunnel—I mean the passenger tunnel—had been opened; weren't you?

A. I was appointed after the bridge had opened but before the tunnel.

Q. And at that time did you understand that additional inspectors had been taken on as a result of the extra work which the bridge and the tunnel required or would require?

A. Yes, sir.

Q. Were there quite a number of inspectors taken on at that time?

A. There were.

Q. And ever since you have been appointed down to the present time your tour of duty—and I of course mean the eight-hour tour of duty—has been the same on Saturdays and Sundays as it has been for the weekdays?

A. That's right.

Q. The traffic over the Ambassador Bridge and through—is that the Detroit tunnel for passengers?

A. Detroit and Canada tunnel.

Q. Is a twenty-four hour service; that means there is a constant travel over these facilities during the full twenty-four hours of each day?

A. There are; yes, sir.

113 Q. As a matter of fact there is considerable population on each side of the river that is served by the tunnel and the bridge?

A. I would say there was.

Q. With the result that there is a considerable stream of traffic all the time?

A. Yes.

Q. And particularly on Sundays and holidays; is that correct?

A. That's right.

114 CHARLES C. MARTIN (Plaintiff)

Page 79.

Q. When were you appointed a customs inspector?

A. June 16th, 1930.

Page 83.

By Mr. STALEY:

Q. Mr. Martin, you received a temporary appointment November 4th, 1929, as I understand?

A. Yes, sir.

Q. And at the time of that appointment were you advised by the office—and I mean by the collector's office here—that customs inspection services were provided for each twenty-four hours?

A. I was told that we were subject to call and there would be night service.

Q. And were you advised that eight hours would constitute the prevailing working hours for each day?

A. That we would work in eight-hour shifts as a rule.

Q. Irrespective of the hour of the day?

A. Yes, sir.

Q. And irrespective of whether it was a week day or a Sunday or holiday?

A. Yes, sir; subject to call on Sundays and holidays.

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Q. Now at the time of your appointment over the bridges and the Detroit Tunnel there was a twenty-four hour interstate travel, wasn't there?

A. It was open to the public twenty-four hours.

Q. And there was established a twenty-four hour customs service?

A. Customs officers were stationed there twenty-four hours.

Q. And that service has been provided ever since the Bridge was opened?

A. Yes, sir.

Q. Or the tunnel opened?

A. Yes, sir.

Q. You knew that when the bridge or tunnel were opened the additional inspectors were taken on to take care of the twenty-four hour service, didn't you, or don't you? Do you one way or the other?

A. I don't know as I knew that they were going to be open twenty-four hours of the day; I may have: I knew it immediately afterwards of course; but at the time I received my appointment, is that it? In 1930? Is that the question?

115 Q. Yes; I will put it that way first?

A. I did know it then, yes; at the time I received my appointment.

Q. And you knew they were putting additional inspectors on to take care of that traffic in those hours of duty?

A. Yes, sir.

Q. Were you appointed as one of the new inspectors provided for that service?

A. Yes, sir.

116 WALTER O. PLITZ (Plaintiff)

Page 100.

Q. When were you appointed a customs inspector?

A. On October 20th, 1930.

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Q. That answers it; but there is no doubt that the claim as it is presented here with respect to Sundays and holidays does cover all-eight-hour tour of duty periods for Sundays and holidays?

A. Yes, sir; and hours extra.

Q. It includes both?

A. Yes, sir.

117 GEORGE H. SPITZ (Plaintiff)

Page 108.

Q. When were you appointed customs inspector?

A. My first appointment was a temporary appointment; I believe in November of 1929.

Page 113.

Q. What I have in mind: do you have any claim during the week day period other than that which was covered by your assigned eight-hour period of duty?

A. No; the eight-hour assigned period.

Q. Now with respect to Sundays and holidays, you did have a regular eight-hour tour of duty assigned?

A. Yes, sir.

Q. And did you perform on Sundays and holidays, on which your claim here is made, any services beyond your assigned eight-hour tour of duty?

A. No, sir.

118 HARRY M. STRINGER

Page 131.

Q. Prior to the opening of the Ambassador Bridge on days other than Sundays and holidays, had the practice of 8-hour tours of duty existed for the 24-hour day?

A. At stations that were open 24 hours a day it was. Some stations just ran 18 or 19 hours.

Q. Were the men generally assigned to 8-hour tours of duty?

A. Yes.

Q. Covering any period during the 24-hour day?

A. Yes, sir.

Q. Prior to the opening of the Ambassador Bridge?

A. Yes, sir.

Q. And did that assignment of tour of duty of 8 hours apply prior to the opening of the Ambassador Bridge to Sundays and holidays?

A. Yes, sir.

Q. Has at any time any extra compensation been made to any of the inspectors under their regularly assigned 8-hour tours of duty during the week days?

A. No.

Q. And that has been ever since 1920?

A. Since 1920; yes.

Q. And prior to 1920 the law did not provide for it?

A. No.

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Q. Were the men assigned to regular 8-hour tours of duty?

A. Yes.

* * * * *

Q. And has that practice continued ever since the Ambassador Bridge was opened, at the Ambassador Bridge?

A. Yes, sir.

Q. And with respect to the week day assignments, the practice at the Ambassador Bridge was the same as at all of the other places, 8-hour tours of duty were assigned for any of the 24 hours?

A. Any of the 24 hours; yes.

Q. Were assignment lists prepared covering the hours on Sundays and holidays that the men were assigned to, and listing the compensatory days off which they were given?

A. Yes, sir.

Q. And lists were prepared for each one of the posts or stations?

A. Yes, sir.

Mr. STALEY. I produce photostatic copies of a specimen assignment list which I will ask that the reporter mark "Government's Exhibits A–1, A–2, A–3, A–4, A–5 and A–6 and A–7."

119 Commissioner RAMSEYER. The documents will be marked as indicated.

(The documents referred to were marked "Government's Exhibit A–1, A–2, A–3, A–4, A–5 and A–6, and A–7.").

[Exhibit A–1 is attached hereto as a specimen Assignment List.]

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Q. After the opening of the Ambassador Bridge, with respect to the Walkerville Ferry and the Detroit and Windsor Ferry, what was the practice adopted with respect to assignment of men to duty at those stations during the week and on Sundays and holidays?

A. They worked staggered 8-hour shifts weekdays and Sundays, and if they worked on Sundays or holidays they received compensatory time off some time the following week, or as soon as we could give it to them.

Q. And that practice adopted at the ferries was the same as was adopted at the Ambassador Bridge?

A. Yes.

Q. And that practice continued in the same manner from that period on to the time these petitions were filed, which was September 19, 1937, and the only change is that today the Detroit and Windsor ferries have discontinued their service since that time?

A. Since July 18 of this year.

Q. When was the Detroit and Canada Tunnel opened?

A. November 3, 1930.

Q. And was the same system of inspection adopted at that time as at the Ambassador Bridge?

A. Staggered 8-hour shifts covering the 24 hours. If they worked on Sundays or holidays they received compensatory time off for that.

Q. As I understand it, they are the five stations at which, subsequent to the opening of the Ambassador Bridge, the same system of inspection has been adopted?

A. What was that again, please?

Commissioner RAMSEYER. Read the question.

(The reporter read the question as above recorded.)

By Mr. STALEY:

Q. That is, the assignment of 8-hour duty during 8 hours with compensatory time off for Sundays and holidays?

A. Yes, sir.

120 Page 139.

Q. Please state whether or not the assignment of inspectors to services at those two ferries on Sundays and holidays were made in pursuance of such application and permit.

A. They were.

Q. All that service?

A. Yes, sir.

Q. Now, where services are rendered under such application and permit, who pays the compensation for the overtime?

A. The carrier, the applicant.

Q. And did the inspector file a special voucher covering the service of his assignment to duty under such permit?

A. He did.

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Q. Prior, then, to 1928, did the inspectors at the Michigan Central Tunnel work 7 days or not?

A. They worked 7 days.

Q. I am speaking now of prior to 1928.

A. Yes, sir.

Q. And for overtime during the week or Sundays or holidays, who paid the overtime compensation?

A. The carriers.

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Q. That practice, you say, was changed in 1929. Then the same practice was adopted at the Ambassador Bridge?

A. Yes, sir.

Q. And since 1928 the men have worked at the Michigan Central Tunnel an eight-hour period?

A. Yes, sir.

Q. During the week, Sundays or holidays?

A. Yes, sir.

Q. And have received compensatory time off?

A. Yes, sir.

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Q. Prior to the opening of the Ambassador Bridge, what were the hours of duty assigned to the inspectors at the three railroad ferries?

A. Staggered 8-hour shifts.

Q. For how many days?

A. 8 even days a week.

121 Q. And how many hours a week did the men work?

A. They worked 52 hours a week.

Q. Prior to the bridge? I am speaking of prior to the bridge.

A. Prior to the bridge they worked 56 hours a week.

Q. And how was their compensation paid for those 56-hour weeks?

A. The Sundays and holidays were paid for by the carrier.

Q. And was that payment made under or by virtue of the permit which has been produced here as Defendant's Exhibit C-1?

A. Yes, sir.

Q. And has there been any change in that practice since the opening of the Ambassador Bridge with respect to the three ferries; namely, the Wabash, the P. M. Railroad Ferry, and the Grand Trunk Slip Dock?

A. There has been no change since. It has continued right along.

Q. Then, as I understand your testimony, except with respect to the Michigan Central Tunnel, for a period between 1928 and the opening of the Ambassador Bridge, any time in excess of the regular 48-hour week was paid for by the carriers?

A. Yes, sir.

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Q. Now, in order to summarize the petitions which have been filed in this case, covering a period from September, 1931, to 1937, it has already been testified to that the claim relates to services performed under regular assigned 8-hour tours of duty. As I understand your testimony with respect to the Ambassador Bridge, the Walkerville, and the Detroit and Windsor ferries, and the Michigan Central Tunnel, the men have performed and been paid for a regular tour of 8-hour duty for week days whether before or after 5 p. m., and for Sundays and holidays, and they have been given compensatory time off during the week days for the 8-hour services rendered on holidays and Sundays?

A. Yes, sir; that is correct.

Q. Now with respect to the three car ferries—speaking now of the period which this petition covers—the men have worked 52 hours a week, the regular working week being 44 hours?

A. Yes, sir.

Q. And the 8 hours being additional?

A. Yes, sir.

Q. And that for the 8 hours additional time each week, an 8-hour period during the 7 days, the men have been paid overtime by the carrier, pursuant to this permit which has been offered in evidence as Defendant's Exhibit C–1. Is that correct?

122 A. Yes, sir.

Q. Has any work covered by the claims of the inspectors here in suit been rendered pursuant to the permit of the carrier?

A. What was that again?

Q. Has any work covered by the claims of the inspectors here in suit been rendered under the permit which the carrier secured, being Form C–1—Being Exhibit C–1?

Mr. DRYSDALE. I object to that question, your Honor.

A. No.

123 WALTER S. PETTY

Page 6.

Q. State your name, age, occupation, and residence?

A. Walter S. Petty. Age 58. Occupation Assistant Collector of Customs at Detroit. My residence is 214 Merriwether Road, Grosse Pointe Farms, Detroit, Michigan.

By Mr. STALEY:

Q. Mr. Petty, you have been Assistant Collector of Customs at Detroit for how long?

A. Since 1927.

Q. And how long have you been in the Customs Service?

A. 33 years.

Q. And where were you stationed before Detroit?

A. I was in the Customs Agency Service, travelling on the road.

Page 169.

Q. Now, just exactly what was the practice prior to the opening of the bridge by which carriers paid this compensation for Sundays and holidays, and overtime?

A. The inspectors would render a statement of their time worked to the Chief Inspector's office, and then our office—that would be sent up to our office, the office of the Collector of Customs, and we would bill the carriers for that extra compensation, and when we received that extra compensation a voucher was prepared for the inspector's signature.

Q. Was that the form which had been introduced here as Exhibit C–3?

A. It is the night service voucher. That is it [indicating]. After the inspector signed that we drew a check on that account and paid it to the inspector.

Q. Where did you get the money from, prior to the Appropriation Act of 1938, to pay that?

A. We got that from the carrier. We collected it from the carrier, and then in turn paid it to the inspector.

Q. How was that collection from the carrier carried?

A. It was carried in a special deposit account under the night service.

Q. In the name of the Collector?

A. Yes.

Q. And were the checks issued by the Collector?

A. Yes, checks were issued by the Collector, drawn on that fund, payable to the inspectors involved.

124 Page 171.

Q. And have all overtime payments for holidays and Sundays to the inspectors there at Detroit been for moneys which the carriers are responsible to pay?

A. Oh, yes.

Q. And have the services of all those inspectors been rendered under this permit application which has been introduced here as Defendant's Exhibit C–1?

A. Yes.

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Q. Now, we understand that, with respect to the Detroit and Canada Tunnel, the Detroit and Windsor Ferry, the Ambassador Bridge, the practices have been the same; namely, the men are assigned to 8-hour tours of duty for any week day, Sunday or holiday, and that for the time, the number of hours they worked on holidays and Sundays, they received compensatory time off during the week?

A. Correct.

Q. Was that practice also true after the opening of the Michigan Central Tunnel, with respect to the freight service at that tunnel, that you have described, or is there a different practice?

A. At the present time?

Q. Yes.

A. No; the same practice prevails there.

Q. As where? At the Ambassador Bridge?

A. Yes.

Q. And is there any difference with respect to the passenger service rendered for the Michigan Central Railroad?

A. Well, we pay extra compensation for Sunday and holiday work on passenger trains.

Q. And is that service performed under the permit of the carrier which is C–1?

A. That is right.

Q. And does the carrier pay the compensation for those Sundays and holidays?

A. Yes.

Q. And that same practice, we understand, applies to the Wabash Ferry, the P. M. Railroad Ferry, and the Grand Trunk Railroad Slip Dock?

A. Yes, they get extra compensation for Sunday and holiday work at those places.

By Commissioner RAMSEYER:

Q. Extra compensation?

A. Yes; extra compensation.

125 Q. Only on passenger trains or for both passenger and freight?

A. For both passenger and freight at these three railroad car ferries just mentioned.

Q. There is extra compensation for holidays and Sundays?

A. Yes.

By Mr. STALEY:

Q. And that extra compensation is paid by the carrier?

A. That is right.

Q. And are the inspectors assigned under the permit which the carrier files with the Collector?

A. That is right.

Q. And their payment for services is made just as you have previously outlined?

A. Right.

Q. And, of course, those men who receive the extra compensation under the carrier's permit for services on Sundays and holidays receive no compensatory time off?

A. No; absolutely not. That is, not for the Sunday and holiday work.

Q. That is what I mean. They do not receive any compensatory time off for Sunday and holiday work?

A. No.

Page 175.

Q. * * * Inspectors receiving the extra compensation at the car ferries and railroads during the week's time, do they work regular 8-hour tours of duty any hour of the week day?

A. Yes.

Q. And they are paid by the Government for their regular 8-hour tour of duty during the week days irrespective of the time when the services are performed?

A. That is right.

Q. Do you have enough inspectors at your station to provide for the car ferries, so as to give such men compensatory time off for services rendered on holidays and Sundays, such as at the Ambassador Bridge?

A. No; we do not.

Q. It would mean an increase of force, would it, to apply to the car ferries and passenger service, the Michigan Central Tunnel, the same practices which have been adopted with regard to the other stations?

A. That is right.

Q. And there are not enough inspectors there now to do that?

A. That's right.

Q. So they have compensatory time off for work on Sundays and holidays?

A. Inspectors do not receive compensatory time off at these stations, as they receive additional compensation for such overtime work performed.

126 Page 180.

By Mr. DRYSDALE:

Q. Regarding these monthly applications made by the carriers for Sunday and holiday service, or night time service of inspectors, are those applications made each month?

A. Yes; I think they are made each month.

Q. They are still made each month, are they?

A. They are still made each month, so far as I know.

Q. There was no change with respect to that practice when the Ambassador Bridge was opened, was there?

A. No; not so far as the practice is concerned concerning the car ferries, no change.

Page 197.

Q. Irrespective of what the practices earlier might have been, during the period covered by these suits, that is, between 1931 and 1937, the method of payment of inspectors at the Michigan Central Tunnel has been the same as at the Ambassador Bridge?

A. Yes; that is right.

Q. Now, there is one other matter which I think probably I have not clearly placed in the record. With respect to the inspectors assigned to the Ambassador Bridge, how many hours a week do they work, including the services they perform on Sundays and holidays?

A. 44 hours a week.

Q. And they are given compensatory time off?

A. For anything in excess of that.

Q. Where that service is performed, 44-hour service, is performed on a Saturday or on a holiday, or a Sunday, are they given compensatory time off for that 8-hour tour of duty?

A. That's right.

Q. What is the situation with respect to the inspectors assigned to the car service, the number of hours they work?

A. They work 52 hours a week.

Q. How are they paid with respect to the regular 44-hour service?

A. They get extra compensation, or two days' pay for every Sunday and holiday worked.

Q. For what?

A. For 8 hours overtime that they put in.

Q. Out of the 52?

A. Out of the 52.

Q. And they are given no compensatory time off, like these men at the Ambassador Bridge?

A. That's right.

127 HARRY W. SMITH

Page 6.

Q. Your age?

A. 64; almost 65. I will be 65 in October.

Q. Occupation?

A. My occupation? My title is liaisson officer in the Bureau of Customs.

Q. Here in Washington?

A. Here in Washington.

Q. And your address of course is here?

A. Yes.

Commissioner RAMSEYER. Take the witness.

By Mr. STALEY:

Q. How long have you been in the Customs Service, Mr. Smith?

A. 38 years past.

Q. At my request, have you made an examination of the records of the customs service of Detroit for the purposes of determining the amount of overtime due, which was payable to Howard C. Myers, John H. Arble, Charles C. Martin, Walter O. Plitz, and George H. Spitz?

A. I have.

Page 17.

Q. Now, during the period that Howard C. Myers, with the other custom inspectors in the Detroit area, except as otherwise

specially noted rendered services on a 44-hour week basis, performed by daily tours of duty of 8 hours, with Saturday a half holiday, have they received their base pay, less whatever deductions you were required to make during the period of the Economy Act?

A. They have received their base pay.

Q. And have they at any time worked more than 8 hours on a single day except Saturday half holiday, which would be 4 hours?

A. Generally, no; but there might be a qualification. You have asked the question in that way, and I have to answer.

Q. I want you to answer the question as it is put to you.

A. Generally, no. There might be cases where the men might have worked 10 hours today and 6 hours tomorrow, where, because of certain exigencies today was lengthened and tomorrow was shortened.

Q. Are they very rare exceptions, or are they frequent exceptions?

A. Well, I would say from recollection now, after three or four months' examination that they were quite regular.

128 Q. And under the usual accounting now, they were paid for an 8-hour tour of duty, which was their base pay; is that correct?

A. That's right.

Q. And on any day covering the overtime period as well as the regular period, did they work beyond the 8 hours, except in the rare instances which you have mentioned?

A. No.

Q. When Myers and the other plaintiffs have been on duty at the railway ferries, namely, the Wabash, the Pere Marquette, the Grand Trunk slip dock, or the Michigan Central passenger station, between the hours of 12:01 a. m. and 11:59 p. m. on Sundays or holidays, please state whether or not such services have been rendered at the request of a carrier under the permit system.

Mr. DRYSDALE. Of course this, you understand, is subject to my objection? I wish to object to it, Your Honor.

Commissioner RAMSEYER. Your objection may apply to all questions along this line, without repetition.

Mr. DRYSDALE. Regarding the permit system.

Commissioner RAMSEYER. All right.

A. They have received their overtime compensation.

By Mr. STALEY:

Q. And paid by whom?

A. Paid by the collector of customs.

Q. And where is the collector of customs to secure that?
A. He has collected it from the carriers.

By Commissioner RAMSEYER:

Q. Now, that is for Sunday and holiday services, you speak about?
A. Yes.
Q. Between 8 a. m. and 5 p. m.?
A. At these particular stations.
Q. Yes?
A. Well, hold on. You said from 8 a. m., at these particular stations. They had adopted the policy of making 12:01 Saturday night to 12 midnight Sunday night as Sunday, so that was a policy that they had pursued, do you see?
Q. That was not in the case before. In the case before, there was no dispute at all but what night-time service was for 5 p. m. to 8 a. m.
Mr. DRYSDALE. That is right.
Commissioner RAMSEYER. Whether week-day or holiday or Sunday.
Mr. STALEY. Maybe I will clear it up.
Commissioner RAMSEYER. And that Sunday and holiday service was between 8 a. m. and 5 p. m. on Sunday and holidays.
Mr. STALEY. I think I will clear it up.

By Mr. STALEY:

Q. Those services rendered on Sunday or holidays at those particular stations which I have called your attention to,
129 was that rendered in excess of the regular 44-hour week?
A. That was in excess of the 44-hour week.

Page 21.

Q. At those stations where compensatory time was given during the week day for services performed on a holiday or a Sunday, please state whether or not the hours for which such compensatory time was given were within the regular 44-hour week?
A. It was within the 44-hour week. In other words——
Q. You have answered. Now, with respect to those stations which we have referred to in my question, where extra compensation was paid at the request of the carrier under the permit system, were the hours of services in such instances which were rendered on a Sunday or a holiday in excess of the 44-hour required week or not?
A. They were in excess of the 44-hour.

Page 39.

Q. Please state whether or not any services performed by Myers on the basis of these documents we have here, for which overtime

compensation is claimed, were rendered at the request of the carrier, under the permit system?

A. No.

Q. Was any service performed by Arble, rendered at the request of the carrier, under the permit system?

A. You are speaking about this claim?

Q. Yes.

A. No.

Q. I am referring to the claims which you have testified to. Were any services performed by Martin, rendered at the request of the carrier, under the permit system?

A. No.

Q. Were any services rendered by Plitz rendered at the request of the carrier, under the permit system?

A. No.

Q. Were any services by Spitz rendered at the request of the carrier under the permit system?

A. No.

130 *Copy of stipulation*

Filed February 17, 1942

It is hereby stipulated by and between the United States of America, represented by its Attorney General, and the plaintiffs in the above entitled actions, represented by their attorney of record, that the photostatic copy of the document hereto attached, Customs Form 3851, Treasury Department, October 1935, is the form of Customs Service for the application and permit to lade or unlade merchandise, baggage or passengers and for overtime services rendered under Section 451 of the Tariff Act of 1930 and the permit issued thereunder.

Said form was used at the port of Detroit from and after October 1935 when overtime was paid and when so used, one copy remained with the Collector and the other was sent to the Inspectors who were to perform overtime services thereunder and each of such inspectors who performed overtime services under that form personally filled in the time under the column headed "Time Employed" and personally signed his name in the column "Signature of Officers", certifying to the overtime services rendered to the carrier. When completed the signed copy was returned to the Collector.

Prior to October 1935 a similar form was used but was kept at the Collector's Office and filled out by the Collector and was not signed by the Inspectors who performed services thereunder. The billing in such cases was made by the Collector from slips

STATEMENT OF SERVICES RENDERED

SEP 14 1936	STEAMER WINDSOR WABASH RY.	4 PM to PM	2100.	$ 83	Night	R. J. Lyons ✓
SEP 15 1936	WABASH RY.	6 00 PM				
SEP 16 1936	STEAMER WINDSOR WABASH RY.	9 30 PM 6 00 PM	2 00	$ 83	night	Wm O Clatz ✓
SEP 17 1936	STEAMER WINDSOR WABASH RY.	10 30 PM 6 00 PM	2100	$ 83	night	E. J. Mitchell ✓
SEP 18 1936	STEAMER WINDSOR WABASH RY.	9 30 PM 6 00 PM	2100	$ 83	NIGHT	H Gilligan ✓
SEP 19 1936	STEAMER WINDSOR WABASH RY.	7:15 PM 2 00 AM	2100	$ 92	NIGHT	H Gilligan ✓
SEP 20 1936	STEAMER WINDSOR WABASH RY.	8 00 AM 8:00 AM	2100	8 75	NIGHT	M J Shefferly ✓
SEP 20 1936	STEAMER WINDSOR WABASH RY.	5:00 PM	2100	11 66	SUNDAY	H Gilligan ✓
SEP 20 1936	STEAMER WINDSOR WABASH RY.	5:00 PM 6:00 AM	2100	$ 83	NIGHT	H Gilligan ✓
SEP 21 1936	STEAMER WINDSOR WABASH RY.	7:30 PM 2:00 AM	2100	$ 83	NIGHT	M J Shefferly ✓
SEP 22 1936	STEAMER WINDSOR WABASH RY.	8:00 AM 6:00 PM	2100	8 25	[illegible]	[illegible] ✓
SEP [illegible] 1936	WABASH RY. STEAMER WINDSOR	7:50 PM 5:00 AM	2100	$ 92	NIGHT	M J Shefferly ✓
SEP 27 1936	WABASH RY. STEAMER WINDSOR	5:00 PM 5:00 AM	2100	11 66	SUNDAY	M J Shefferly ✓
SEP 28 1936	WABASH RY. STEAMER WINDSOR	7:35 PM 6 PM	2100	$ 92	NIGHT	M J Shefferly ✓
SEP 29 1936	WABASH RY. STEAMER WINDSOR	8:30 PM 6:00 AM	2100	$ 92	NIGHT	H Gilligan ✓
SEP 30 1936	WABASH RY. STEAMER WINDSOR	7:35 PM 6:00 AM	2100	$ 92	NIGHT	M J Shefferly ✓

Customs Form 3041
(Revised April 1, 1932)

Amended
ORIGINAL OR DUPLICATE

APPLICATION AND PERMIT (MONTHLY) TO LADE OR UNLADE MERCHANDISE, BAGGAGE, OR PASSENGERS AND FOR OVERTIME SERVICES

UNITED STATES CUSTOMS SERVICE

DISTRICT NO. 38 PORT OF Detroit August 28, 1936

To the COLLECTOR OF THE PORT:

Sir: Bond or security having been given as required by law, application is hereby made for the lading or unlading, either in day or night other than official hours, of merchandise, baggage, or passengers on or from the vessels, lighters, cars, or other conveyances of the

Wabash Railway Company at **Detroit, Michigan** from **September 1**

1936, to **September 30** 1936, (Not to exceed ONE MONTH) immediately after the arrival of such vessels or other conveyances at the place named, and before or after regular entry at the customhouse, and/or for the services of customs officers and employees in connection with such lading or unlading or the entry or clearance of the vessels, or the issuance of their marine documents or recording of instruments of title.

It is hereby agreed that all cargo discharged under this application shall remain upon the wharves or other places of unlading until cleared by permits therefor or removed in conformity with the terms of the regular general order permits, to be issued after entries of the vessels at the customhouse, and that the said vessels and their owners shall be held liable for all duties which may be found to be due the Government on account of any portion of the cargo lost or stolen from the wharves after being discharged from the vessels and before released by proper delivery permits or removal under the general order permits; and, furthermore, that the liability to the owners of any portion of the cargo and responsibility for its care shall not be impaired, nor affected by any proceedings under this application.

Employees required: 8 Inspectors

Bond for: **Overtime** dated **March 1** 1936 (Show if known: Inspectors, examiners, weighers, gaugers, samplers, laborers)

Amount of deposit, $

Verified by [redacted] Address [redacted]

Superintendent

To CUSTOMS OFFICER CONCERNED: **PERMIT (LICENSE)** (Do Not Write)

Application approved and permit (license) granted. This permission will not become available, however, until after the proper manifest and other required customs documents shall have been delivered to the proper customs officers and no part of the cargo unladen shall be moved from the wharf, lighter, or other place of unlading before the issuance of proper permits therefor. You will assign the necessary employees.

AUG 19 1936, 193[illegible]

Deputy Collector

Station No. [redacted] **STATEMENT OF SERVICES RENDERED** Rate [illegible]

We, the undersigned, certify that the statement of services rendered noted opposite our respective names is correct and true.

Date	Vessel, Etc.	Time Employed	Rate of Pay	Amount Earned	Name of Officer	Signature of Officer
	WABASH ST.	6 to 8 PM				
SEP 2- 1936	STEAMER WINDSOR	7 to 8 PM	2100	x 92	Night	C. L. [illegible]
	WABASH ST.	6 to 8 PM				
SEP 3- 1936	STEAMER WINDSOR	6-7 PM	2100	x 92	night	W. D. [illegible]
	WABASH ST.	6 to 8 PM				
SEP 4- 1936	STEAMER WINDSOR	6 to 7 PM	2100	x 92	night	W. D. [illegible]
	WABASH ST.	8:00 AM				
SEP 6- 1936	STEAMER WINDSOR	8 to 9 AM	2100	8 75	night	W. D. [illegible]
	WABASH ST.	8 to 9 AM				
SEP 6- 1936	STEAMER WINDSOR	5-6 PM	2100	[illegible]	Sunday	J. Harriman
	WABASH ST.	5 to 6 PM				
SEP 6- 1936	STEAMER WINDSOR	6 to 7 PM	2100	x 92	Night	C. J. Harriman
	WABASH ST.	2:00 AM				
SEP 7- 1936	STEAMER WINDSOR	2:00 AM	2100	8 75	night	W. D. [illegible]
	WABASH ST.	8 to 9 AM				
SEP 7- 1936	STEAMER WINDSOR	5 to 6 PM	2100	11 66	Sunday	J. Harriman
	WABASH ST.	5 to 6 PM				
SEP 7- 1936	STEAMER WINDSOR	6 to 7 PM	2100	x 92	Night	C. J. Harriman
	WABASH ST.	2:00 AM				
SEP 13 1936	STEAMER WINDSOR	2:00 AM	2100	8 75	night	W. D. [illegible]
	WABASH ST.	6 to 8 PM				
SEP 19 1936	STEAMER WINDSOR	6 to 8 PM	2100	11 66	Sunday	H. J. [illegible]
	WABASH ST.	6 to 8 PM				
SEP 13 1936	STEAMER WINDSOR	6 to 7 PM	2100	x 83	Night	[illegible]

(Signature of Officer)

turned in by the Inspectors who performed services,
131 such slips being mimeographed forms furnished by the Collector's office, a copy of which mimeographed form is annexed hereto marked Exhibit "A", and made a part hereof.

(S) FRANCIS M. SHEA,
Assistant Attorney General.
(S) ROBERT M. DRYSDALE,
Attorney for Plaintiffs.

Dated January —, 1942.

132 *Exhibit A*

Detroit, Michigan_____
(Date)

THE COLLECTOR OF CUSTOMS, *Detroit, Michigin.*

SIR: In addition to my regular tour of duty from_____M. to_____M., I have performed the following overtime (Night, Sunday, holiday) service for the_____
(Transportation company)
_____on board the steamer, train_____
From_____M. to_____M., on_____to the amount of
(Date)
$_____. My salary is $_____per annum. Fee collected_____.
(Yes or No)

Approved:

_____
Inspector

_____
(Master of Steamer)

135 *Portions of the record which the plaintiffs deem material to the errors assigned*

JOHN H. ARBLE

Page 3:

14. Q. What was your salary during that period of time?
A. Twenty-one hundred dollars basic pay per annum.

Page 4:

18. Q. Will you state at what stations such services were performed?

A. As outlined in my schedule, Detroit and Windsor Ferry, Walkerville Ferry, Detroit and Canada Tunnel, Ambassador Bridge, M. C. Railroad Tunnel, Wabash Ferries, Grand Trunk Slip Dock, and the Miller Ferry Line of St. Clair, Michigan.

The COURT. Are there two tunnels under the river here?

A. No, sir—yes; there is one freight tunnel, a railroad tunnel; Michigan Central has a railroad tunnel.

The COURT. That is just the railroad.

A. Connects railroad lines in Canada with those in the United States.

The COURT. And the Detroit and Canada tunnel is what?

A. Vehicular.

The COURT. When was the railroad tunnel constructed?

A. I am not positive; 1914 I believe.

The COURT. It was before the vehicular tunnel some time?

A. Yes sir.

The COURT. All right.

Page 5:

19. Q. Please tell us what is the Detroit and Windsor Ferry?

A. International ferry-boat between Windsor, Ontario, and Detroit, Michigan.

20. Q. During the time embodied in your statement did that ferry service work twenty-four hours a day?

A. No, sir.

136 21. Q. During what hours did it work?

A. Originally the hours were from 5 till 2 A. M.; 5:30 A. M. until 2:00 A. M. the following morning.

22. Q. Was traffic more or less continuous during those hours on that ferry line?

A. According to the schedule of the ferry business.

23. Q. There was more than one boat; was there not?

A. Yes, sir; the service varied from ten minutes upwards per boat docking.

24. Q. And that ferry system served to carry passengers, baggage, merchandise, from Windsor, Ontario, to the city of Detroit?

A. Yes, sir.

The COURT. The other way, too?

A. Yes, sir.

25. Q. What is the Walkerville Ferry, referred to in the schedule?

A. An international ferry connecting Walkerville, Ontario, with Detroit.

26. Q. Was there continuous service over that ferry line during the time covered by your statement?

Page 6:

A. Yes, sir; with the exception of a few hours in the A. M. from 2:00 until 5:30—approximately those hours.

The COURT. Give the hours again.

A. Approximately from 2:00 to 5:30 there was no operation.

The COURT. That is the same as the Detroit-Windsor?

A. Yes, sir.

The COURT. It would operate from 5:30 in the morning until 2:00 A. M. the next day?

A. Yes, sir.

27. Q. And what came over on those ferries from Walkerville to Detroit?

A. Foot passengers, vehicular traffic, commercial buses, commercial importations on trucks.

28. Q. I am speaking of the Walkerville Ferry.

A. There were no buses. Pedestrian traffic, vehicular traffic, and commercial importations.

29. Q. Did merchandise come over on that ferry?

A. Yes, sir.

30. Q. On the trucks?

A. Yes, sir.

187 31. Q. Did merchandise come over that wasn't loaded on trucks?

A. Yes, sir; people would carry it and it would be assessed duty.

Page 7:

43. Q. What is the Michigan Central Tunnel?

A. It is a railway tube under the Detroit River between Windsor, Ontario, and Detroit.

44. Q. Has that ever been closed?

A. It has never been closed except by a wreck, but it has never been closed officially to business.

45. Q. Was there continuous service through that tunnel?

A. Yes, sir.

The COURT. That is the railroad?

Mr. DRYSDALE. That is the freight tunnel.

46. Q. Did that tunnel carry both passenger and freight trains?

A. Yes, sir; anything that runs on wheels on a railway came across provided the head clearance is right.

47. Q. Was service required at that tunnel twenty-four hours a day?

A. Yes, sir.

Page 10:

61. Q. When was the Ambassador Bridge opened?

A. November 1929.

62. Q. The Detroit-Canada Tunnel, when was it opened?

A. One year later; November 1930.

63. Q. All of these stations that have been described by you were open and operating during all of the time covered by your statement, your bill?

A. Yes.

64. Q. The Detroit and Windsor Ferry is an old established line; is it not?

A. Yes, sir. Over fifty years I believe it has been in operation.

Page 13:

Page 85:

Q. So that the Michigan Central Railway Company had two sets of inspectors working?

A. Yes, sir.

138 86. Q. One in the freight yard and one in the passenger station?

A. Yes, sir.

Page 14:

88. Q. That is, it was customary for the customs inspector serving the passenger traffic at the Michigan Central to get paid for this nighttime, Sunday and holiday services during this period?

A. No, sir; I didn't say that.

89. Q. Not nighttime; I mean Sunday and holiday services?

A. Yes, sir.

90. Q. But not nighttime service?

A. No, sir; not at the passenger station.

91. Q. But they didn't pay for nighttime, holiday or Sunday services in connection with the handling of freight?

A. No, sir.

92. Q. Is that right?

Page 15:

A. Yes, sir.

Page 26:

149. Q. Now did you understand when you received your temporary appointment that if you worked on a Sunday or a holiday that you would get compensatory time during the week off for that period?

A. There was no understanding made.

150. Q. As a matter of practice from the time that you had your temporary appointment were you given one day compensatory time during the week for the time on Sunday?

A. I don't know whether it was a matter of practice or not. That is what happened.

151. Q. Well now has there been any change in it from the time you started there down to the present time, in giving that one day of compensatory time for eight hours service?

A. Not that I remember.

Page 27:

154. Q. And isn't it pretty well established and known by all you inspectors that if you worked an eight-hour tour of duty on a

holiday or a Sunday that you got one day compensatory time during the week?

139 A. It would be insubordination not to take the day off.

155. Q. Don't let's fence; all that the Government wants in these cases is just what the facts are. We want the court to have the facts and the court can decide this question of law which has been raised. But it has been my understanding that every inspector who served an eight-hour tour of duty on holidays and Sundays was given and took a day off during the week?

A. He was given no choice.

Mr. DEYSDALE. We will concede that on the record.

Mr. STALEY. Then why doesn't the witness answer?

A. He was given no choice; he had to take it.

156. Q. And when Saturday afternoon became a holiday he was given compensatory time for any time that he served Saturday afternoon?

A. At some later date.

The COURT. If you were off Saturday, worked Saturday afternoon and Sunday, in the following week would your superior tell you to take this day and a half off?

A. Not always; sometimes the day off for that would come three months after that time.

The COURT. But you would get notice from your superior when to take the day?

A. It would be scheduled in your working hours.

The COURT. Who schedules it?

Page 28.

A. The officer in charge of your station.

The COURT. All right.

157. Q. And at the time you started there was a schedule provided what your tour of duties would be for a period?

A. Generally in advance one or two weeks.

158. Q. And that practice has been followed ever since?

A. Without exception.

159. Q. And the schedule covers the time off which we call compensatory time?

A. It provides compensatory time.

160. Q. For the inspectors?

A. Yes.

140 Page 30:

170. A. Yes, sir; there are overloading periods when the traffic is heaviest and it necessitates the major part of the inspection hours.

Page 31:

177. Q. And at all times they are divided into eight-hour shifts?

A. Yes, sir; eight hours work done by each man.

178. Q. And where they work on Sundays or holidays or Saturday afternoon they receive compensatory time during a week day?

A. That has been the practice here at Detroit.

179. Q. And those conditions have existed ever since you joined the service?

A. They were in effect when I joined the service.

Page 36:

By Mr. DRYSDALE:

R. D. Q. 204. Q. The compensatory time off which has been granted you for your nighttime, Sunday and holiday services is the same amount of time, is it not, that you worked? I will make it plain: if you worked during the nighttime for eight hours, what would be the amount of your compensatory time?

A. The number of hours have been identically the same.

Page 37:

205. Q. In other words, they didn't give you more hours off than the number of hours you worked?

A. No, sir.

Page 55:

12/17/41

D. 28. Q. Name the car ferries. You say, the car ferries. Name them, please.

A. The Pere Marquette Railroad car ferry, the Wabash car ferry, the Grand Trunk car ferries.

29. Q. What was the practice at those car ferries that you have just named, with respect to payment for extra compensation for Sunday and holiday service, prior to 1931?

A. There was never any change in the practice. It was paid prior to that.

141 Page 58:

38. Q. When you performed services on Sundays and holidays, at the car ferries, did you always get extra compensation for that?

A. Yes.

39. Q. Now, when you performed services other than at the car ferries, on Sundays and holidays, and for which extra compensation was paid as you have testified to, upon what was such payment conditioned?

A. That I was requested to work.

40. Q. When?

A. During the 24-hour period that constituted the Sunday or the legal holiday.

Page 96:

R. D. Q. 180. Q. When you were paid extra compensation for Sunday and holiday services, was such payment for work on a Sunday or holiday or extra time?

Page 97:

A. Well it was because I worked Sunday or a holiday, because I came to work that day, took that day, which was my own, and performed services on that Sunday or legal holiday.

R. D. Q. 182. Q. What did you mean by "your own"? You used the words, there, "your own." What do you mean by that?

A. It has always been held by law and all the congressional committee hearings on this Customs, that Sundays and nights were the man's own time.

R. D. Q. 184. Q. What do you mean by "my time," in that answer?

A. Sundays and holidays were considered days that we would have off, I would have off for my own enjoyment or recreation or religious convictions, or whatever I wished to devote them to.

Page 133:

D. 1. Q. Referring again, Mr. Arble, to the car ferries, I ask you if, when you served a regular tour of duty at the car ferries, on a Sunday or a holiday, you were paid extra compensation?

A. Yes.

142 Page 136:

R. D. Q. 13. Mr. Arble, regarding exhibit Govt. R–A. just introduced by Mr. Staley, I will ask you where or in what cases that form was used in practice at Detroit?

A. In the period covered by this litigation, at the P. M., and Wabash Railroads. This form wasn't signed and certified to by the inspector in each instance of work. There were a good many sent to the main office, and there the entries were made on a voucher which he certified to. For special services, unlading vessels and outside services, where there was individual assignment each time, then this form was certified on the completion of the work, or the entry was made upon it for that particular work.

By Mr. STALEY:

R. D. Q. 14. Who prepared that memorandum, in order to have it right in here? Did the inspector prepare it?

A. The individual inspector.

By Mr. DRYSDALE:

R. D. Q. 15. What memorandum do you refer to now?

A. Merely a mimeographed form, with a simple statement, "I have performed the hours of duty from (blank) to (blank) on such a date, at the (blank) company or vessel," and sign your name to it.

R. D. Q. 16. That was sent to the main office?

A. That was sent to the chief inspector's office. I don't know what disposition was made, clerically.

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HARRY N. STRINGER

Page 129:

By Mr. STALEY:

2. Q. How long have you been attached to the Collector of Customs Office in the District of Detroit?

A. Since June 1908.

3. Q. Starting with the period from 1920 on, will you please state what your respective assignments have been down to the present?

A. The positions that I have held?

4. Q. Yes; from 1920 down to the present.

A. I was inspector in charge of the Detroit and Windsor Ferry until September, 1925. I was inspector in charge at the Michigan Central Tunnel from September 1925 until May 3, 1926, and since then I have been Chief inspector.

5. Q. And as chief inspector did your duties include services at all the various stations in the Detroit Customs District?

A. I supervised the work of all the different stations and visited them almost daily.

6. Q. Prior to your appointment as chief inspector were you familiar with the other stations, the hours of duty and so forth?

A. Yes; I was.

7. Q. Since the Ambassador Bridge has been opened have the assignments of men to duty been under the direction of your office?

A. Yes.

8. Q. Prior to the opening of the Ambassador Bridge had the matter of compensatory time off for Sundays and holidays been in practice at Detroit?

A. No.

9. Q. And the practice, then, has been since the Ambassador Bridge was opened?

A. Yes.

144 Page 132

18. Q. When the Ambassador Bridge was opened, please state the practice which was adopted covering 8-hour tours of duty for both weekdays, Sundays and holidays, and the method of assignment of the inspectors to service during such tours of duty.

A. The method that was in practice then was that if they worked on Sundays or holidays, they should have some day off the following week.

20. Q. Which has been stated to be compensatory time?

A. Yes.

21. Q. I think probably I can approach it with a little more directness in this way. When the Ambassador Bridge was opened, what was the practice at the Ambassador Bridge with respect to the assignment of inspectors to 8-hour tours of duty on Sundays and holidays, and how was the time which they spent on Sundays and holidays compensated for?

A. If they worked eight hours during Sundays or holidays, they got eight hours off sometime later for it.

22. Q. Were the men assigned to regular 8-hour tours of duty?

A. Yes.

By Commissioner RAMSEYER:

23. Q. You said "sometime later." You mean on weekdays?

A. Yes; some weekdays; yes, sir; within the next week or two.

CORRECTION OF APPELLANT'S REQUESTED TESTIMONY

STRINGER—September 28, 1938

100. Q. For how many days?

A. Seven days a week.

145 Page 138:

37. Q. Prior to the opening of the Ambassador Bridge, what was the practice with respect to the Walkerville Ferry and the Detroit and Windsor Ferry?

A. They paid overtime for Sundays and holidays.

Page 142:

56. Q. And did that practice of compensation being paid at these two ferries by the carriers for Sundays and holidays, prior to the opening of the Ambassador Bridge, cover the period from 1920 down to 1929?

A. Yes, sir.

58. Q. What was the practice at the time of the opening of the Ambassador Bridge, and since, with respect to the assignment of inspectors at the Michigan Central Tunnel?

A. They are assigned to 8-hour shifts, which cover the twenty-four hours, and are given compensatory time off for Sundays and holidays.

59. Q. The practice therefor, at the tunnel, is also the same as that at the Ambassador Bridge?

A. Yes, sir.

60. Q. When was that practice adopted at the Michigan Central Tunnel?

A. At the same time that it was adopted at the Bridge.

61. Q. And prior to the opening of the bridge, what was the practice at the Michigan Central Tunnel?

A. They worked every day, 7 days a week, without compensatory time and without overtime.

62. Q. Seven days a week would mean how many hours a week?

A. Fifty-six hours a week.

63. Q. How many additional hours' pay did they receive, then, for that week?

A. Prior to 1929?

64. Q. Yes. Strike that question out. It isn't intelligible. What was the regular number of hours for a week at that time? Did it cover 6 or 7 days?

A. Seven days.

65. Q. At this bridge?

A. Prior to 1929.

146 P. 143:

66. Q. Was there any overtime payment made to the inspectors at the Michigan Central Tunnel prior to 1929?

A. Yes, sir.

67. Q. Please state what period of overtime they were paid for?

A. Well, starting in 1920—I am not familiar with the exact dates—the Michigan Central Tunnel, to the best of my belief, paid overtime for about two years, and then they suspended payment of overtime for three or four years. Then there was a decision rendered that they had to pay it, and they paid up all that back overtime, and if I remember right they started to pay overtime again and paid overtime until sometime in 1928, when it was suspended again. Then they worked 7 days a week until November, 1929, when we started giving a day off for Sundays and holidays.

P. 146:

83. Q. Now, between 1928 and 1929, what was the practice there at the Michigan Central Tunnel?

A. If I remember right, they worked 7 days a week.

84. Q. Did the carrier pay any part of the 7 days a week?

P. 147:

A. Not for that period. Not to the best of my knowledge he did not.

85. Q. They did not? Well, that covers, does it not, the matter of the work at the Michigan Central Tunnel, fully, you think, during the period?

A. Yes, sir.

86. Q. After 1919–29 or 1928—let me keep myself straight here—you say they worked how many hours at the Michigan Central Tunnel?

A. Prior to 1929?

87. Q. No.

A. Since 1929?

147 88. Q. Let me state the question again. You say the practice was changed in 1928? Did you or did you not?

A. The payment of overtime or compensation for Sundays and holidays, if I remember right, was discontinued some time in 1928.

89. Q. And what number of hours were the men regularly assigned to at the Michigan Central Tunnel in 1928, up to the time that the Ambassador Bridge was opened?

A. They were staggered 8-hour shifts, covering the 24 hours, 7 days a week.

90. Q. And the compensation for the 7 days a week—who paid the compensation for 7 days a week. Who furnished the money? Where did the money come from for that compensation for 7 days a week?

A. That was regular Government salary.

91. Q. And was paid on the basis of the salary?

A. Yes, sir.

P. 148:

92. Q. Were they paid anything in addition to their regular per diem rate?

A. No, sir.

93. Q. That practice, you say, was changed in 1929. Then the same practice was adopted at the Ambassador Bridge?

A. Yes, sir.

P. 159:

117. X Q. Mr. Stringer, these inspectors at Detroit never collected pay for their night overtime, Sunday or holiday services from the carriers, did they, direct?

A. No, sir.

118. X Q. They were always paid by the Government?

A. Yes, sir.

119. X Q. And the inspectors themselves had nothing to do with the collection of their extra compensation from the carrier?

A. They did not.

148 Page 160:

120. X Q. Mr. Stringer, you have testified that at the time of the opening of the Ambassador Bridge at Detroit, there was a change put into effect regarding the payment of extra compensation to inspectors. Now, prior to that time they were paid in cash for night time, Sundays, and holiday services, were they not?

A. For Sunday and holiday service; not for nighttime services?

Page 161:

121. X Q. Not for night service?

A. Not for night service on week days.

122 X Q. Are you sure of that?

A. Yes, sir.

123 X Q. But when the bridge was opened up, they were paid after that by making allowance for compensatory time?

A. Yes, sir.

124 X Q. Is that right?

A. Yes, sir.

Page 162:

132 X Q. So that your testimony regarding the services at the Michigan Central Tunnel applies only to the freight service?

A. Yes, sir.

133 X Q. And not to the passenger service?

A. No, sir.

134. X Q. Well, did the inspectors at the Michigan Central Tunnel from 1928 to 1929, in the passenger service, get pay either in cash or compensatory time for Sunday and holiday services?

A. Yes, sir; they did.

135 X Q. Do you know whether that was paid in cash?

Page 163:

A. It was paid in money.

149 136. X Q. You can't account, can you, for any reason why there should be any differentiation between the passenger service and the freight service? Why one should be paid and the other should not?

A. An order from the Department, or from the Collector to me.

137 X Q. You were just obeying orders received from your superior?

A. Yes, sir.

138. X Q. After the opening of the Ambassador Bridge, the inspectors at the Wabash Ferry, the P. M. Ferry, and the Grand Trunk Slip Dock still continued to be paid in money?

A. Yes, sir.

139 X Q. For Sunday and holiday services?

A. Yes, sir.

140. X Q. And are still so paid?

A. Yes, sir.

141. X Q. How about night time services at those three places? Are they paid for that in time or money?

A. No, sir; they are paid their regular government salary.

142 X Q. So that from the time of the opening of the Ambassador Bridge down to the present time at the Port of Detroit inspectors who work on Sundays and holidays at the P. M. Ferry, the Grand Trunk Slip Dock and the Wabash Ferry get paid in money for their Sunday and holiday service?

Page 164:

A. Yes, sir.

143. X Q. But they do not get paid in money at the Ambassador Bridge?

A. No, they do not.

144. X Q. Nor have they been paid in money at the Detroit and Windsor Ferry?

A. They have not.

145. X Q. But at the Detroit and Windsor Ferry and the Ambassador Bridge they have been compensated for Sunday and holiday service by allowance of compensatory time?

A. That is correct.

150 Page 164:

146. X Q. Now, the services to be performed by inspectors at the Wabash Ferry, the P. M. Ferry, and the Grand Trunk Slip Dock cover a period of 24 hours a day, do they not?

A. Except the Grand Trunk slip dock. That goes from 7 A. M. until 1 A. M. the next morning.

147. X Q. But the other two stations the service there is required 24 hours a day.

A. Yes, sir.

148. X Q. And on the Grand Trunk slip dock, 18 hours a day or thereabouts.

A. Yes, sir.

149. X Q. At the Grand Trunk slip dock, the service there was 24 hours per day until a year ago? It that right?

A. That's right.

150. X Q. So that with the exception of the past year at the Grand Trunk slip dock, the hours of service at those three railroad ferries—I mean the Detroit and Windsor Ferry and the Ambassador Bridge, they were all 24 hours a day?

A. Yes, sir.

151 WALTER S. PETTY

9/28/38

Page 174:

43 Q. Is that work at those four stations where extra compensation is paid by the carrier, in addition to the regular week day 8-hour tour of duty?

A. I don't believe I quite understand that question, Mr. Staley.

Page 176:

50. X Q. Mr. Petty, you don't mean to infer, do you, that the reason that the inspectors are paid in money at these railway ferry docks for services at the railway ferry docks is because you have not a sufficient number of inspectors to give them time off?

A. Well, we have never had a request from those ferry companies, those car ferries, to be relieved from the payment of that extra compensation, but if we did——

51. X Q. Mr. Petty, I want an answer to the question.

Mr. STALEY. Wait a minute. Let him answer the question.

Commissioner RAMSEYER. Repeat the question and answer the question as nearly as you can.

(The reporter read the question as follows:)

"50. X Q. Mr. Petty, you don't mean to infer, do you, that the reason that the inspectors are paid in money at these railway ferry docks for services at the railway ferry docks is because you have not a sufficient number of inspectors to give them time off?"

By Commissioner RAMSEYER:

52. X Q. Do you know the reason why? If you do, state that.

A. We have never had a request from those carriers to relieve them——

53. X Q. Is that the reason why? Go ahead. I thought you were through with your answer.

152 Page 177:

A. (Continuing.) To be relieved from the payment of that extra compensation. If they made that request to us to be relieved——

Mr. DRYSDALE. I don't want conclusions that the witness may make.

Commissioner RAMSEYER. I think you have answered the question.

Mr. STALEY. No; I object. I ask that the witness be permitted to answer the question. He has been stopped in both answers.

Commissioner RAMSEYER. Well, you can take it up on redirect.

By Mr. DRYSDALE:

54. X Q. In any event, the inspectors performing Sunday and holiday service at those railway docks have been paid in money for their Sunday and holiday services through all the period covered by these petitions; namely, from 1931 to 1937?

A. That is correct.

Mr. STALEY. You mean money or checks.

Mr. DRYSDALE. Well, money or checks. They are both the same when you get a collector's check.

Mr. STALEY. I know, but you have made a distinction between cash and checks.

Mr. DRYSDALE. Well, meant the distinction to be made between money and compensatory time.

Mr. STALEY. That is all right, then; just so it is understood.

Page 201:

175. R. X Q. Now, at the present time over on the P. M. dock, where the Pere Marquette trains come to the Port of Detroit and overtime services of inspectors is required, isn't it the practice with respect to the Pere Marquette that such extra services are supplied by sending down an inspector from the Ambassador Bridge to work there a few hours and then have that inspector complete his eight hours back at the Ambassador Bridge?

A. Yes.

153 Page 202:

176. R. X Q. That saves the Pere Marquette Railroad the liability for paying for the overtime or extra time?

A. That is a matter we have already discussed with the Department as to whether or not we were right in making that ruling.

177. R. X Q. I am not questioning the legality of it, nor your position in the matter. I just wanted to get the fact that that is being done. That is a typical instance, when a car ferry on the P. M. is going back and forth and the customs inspector has been there for, say 8 hours, and they want to work a couple of hours more, instead of obtaining the services of an inspector at that dock and paying him for the extra two hours, you send down an inspector from the bridge or some other place to work the two hours, and then complete his eight hours back to his other station?

A. That is right.

178. R. X Q. In order that the record may be complete, is that the same practice on Sundays and holidays in the Customs Service?

A. Well, if it was on Sundays and holidays these men would get extra compensation for that.

154 BYRON E. REDDICK

Page 43:

1. Q. When were you appointed a customs inspector, Mr. Reddick?

A. In May 1926.

2. Q. Did you take the oath of office at that time?

A. I did.

3. Q. Were you a customs inspector at the Port of Detroit in November 1929?

A. Yes, sir.

4. Q. That is, from 1926 to November 1929 you were stationed at Detroit?

A. Yes, sir.

5. Q. Do you recall the opening of the Ambassador Bridge?

A. I do.

6. Q. That is the Ambassador Bridge referred to by Mr. Arble in his testimony?

A. It is the only one.

7. Q. When that bridge was opened was there any change made in the basis for night time, Sunday, and holiday services of inspectors at the City of Detroit?

A. Overtime was discontinued.

8. Q. Was any reason assigned for it that you know?

A. None except adjudged to be a discrimination between the ferry and the bridge.

Page 46:

By Mr. STALEY:

11. Q. Now prior to 1929 the only tour of duty that was assigned to inspectors by the Detroit office was an eight-hour tour of duty; is that correct or not?

A. That was correct; it might vary slightly; for instance, they might run an extra boat on two ferries, but in that case that was ignored and we didn't pay any attention to it.

12. Q. But your regular tour of duty was limited to eight hours a day?

A. That's right.

13. You had no regular tour of duties on holidays or Sundays; I am speaking of prior to 1929?

A. We were assigned to the same hours, yes; from the opening of the ferry, with staggered shifts; I didn't have any—they would assign me perhaps from 5:00 in the morning——

The COURT:

155 Page 47:

He is asking you before 1929, before the Ambassador Bridge was opened you had regular tours of duty?

A. Yes, sir.

The COURT. And when Sunday came and they wanted you for a few hours, they sent you out, did they, on Sunday?

A. On Sunday we were assigned just the same as on the other days of the week.

The COURT. All right.

By Mr. STALEY:

14. Q. Well now, did you have a regular tour of assignment for which you received only your pay, when you worked Sundays and holidays?

A. Well on Sundays and holidays we received two days' pay, no matter what hours we worked, just as long as we put in the eight hours.

Page 51:

37. Q. Yes; the regular tour of duty that you were assigned to prior to 1929?

A. That was presumably an overtime collection on the Sundays and holidays.

38. Q. You were given no regular assignment or tour of duty on Sundays or holidays or after 5:00 o'clock at night?

A. We were scheduled exactly the same way as we were the other days of the week.

Page 54.

R. D. 57. Q. Mr. Reddick, prior to the opening of the Ambassador Bridge how many hours a day were the customs inspectors at Detroit liable to be called to service?

A. Well it was my understanding that you could be called out at any time that they demanded your services and needed them any part of the twenty-four-hour day.

R. D. 58 Q. Mr. Arble has testified here that at the Detroit and Windsor Ferry Company there was continuous service there during the whole twenty-four hours except from 2:00 to 5:00 or 5:30 in the morning?

A. That was right, I believe.

156 Page 54:

R. D. 59. Q. Is that right?

A. That's right.

Mr. STALEY. You were stationed there, were you?

A. Yes, sir.

R. D. 60. Q. Were customs inspectors stationed at those ferry docks during all the time the ferries were running?

A. Yes, sir.

R. D. 61. Q. And tours of duty were assigned to that service just like they were at the Ambassador Bridge subsequently, were they not?

Mr. STALEY. Now do you know, first of all?

A. Yes; tours of duty were scheduled there for eight hours; they could be staggered from the time they opened in the morning until such period as gave them their eight hours afterwards.

R. D. 62. Q. Their tours of duty there before 1929 were eight hours staggered so that the whole time the ferry was running would be covered?

A. That's right.

By Mr. DRYSDALE:

R. D. 63. Q. How many hours a day was service maintained by the customs inspectors at the Walkerville Ferry prior to the opening of the Ambassador Bridge?

Mr. STALEY. Do you know? Were you there?

A. 5:30 to 1:30—I beg pardon; I wasn't at the station at that time.

R. D. 64. Q. You know when these ferries ran up there, don't you?

A. I couldn't state at that date because they may have changed the schedule.

R. D. 65. Q. But you do know about the Detroit and Windsor ferry?

A. I do.

R. D. 66. Q. How about the Michigan Central Tunnel? How many hours a day was service provided there?

A. I am not conversant with that at any time during the time mentioned here.

R. D. 67. Q. I mean prior to 1929?

A. That was twenty-four hours continuous service there, at the Michigan Central Railway tunnel.

Mr. STALEY. You don't know who paid for that service?

A. I do not.

157 Page 55:

R. D. 68. Q. How about the Wabash ferries; how many hours of service per day?

A. Beg your pardon; we had a Government check on that from the collector signed by the collector; who paid I don't know.

Page 56.

R. D. 69. Q. How about the Wabash ferries? How many hours a day was that?

Mr. STALEY. Were you at the Wabash ferries prior to 1929?

A. Yes; and we had continuous service on some of the boats down there at that time, and some of them would work perhaps two eight-hour shifts, and they would be assigned the eight hours throughout that time.

R. D. 70. Q. How about the P. M Railway ferries?

A. Exactly the same

R. D. 71. Q. You were there?

A. I worked at the P. M.; yes.

R. D. 72. Q. Prior to 1929?

A. Yes, sir.

R. D. 73. Q. Would that be continuous service during the day there?

A. They had spasmodic service; sometimes they would run continually the twenty-four hours if business justified; otherwise they would shorten down.

The COURT. The ferries are not in this case.

Mr. DRYSDALE. They are in one of the others. The P. M. is not in this Arble case.

By Mr. DRYSDALE:

R. D. 74. Q. Were you called to service by the carriers or by the collector of customs?

A. We were called by the collector because the carriers never called us.

R. D. 75. Q. You had nothing to do with the carrier's requests for services, did you?

Page 57:

A. Not at all; we received our notification through the office.

R. D. 76. Q. Did you ever get paid direct from the carriers for these services?

A. No, sir.

Mr. STALEY. You mean you didn't get the checks of the carriers?

158 Page 57:

A. We didn't get any checks from the carrier, or money.

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Page 120:

D. 14. Q. Since you entered the service, at what stations in Detroit was extra compensation paid for Sunday and holiday service?

A. That is since I entered in 1926?

D. 15. Q. That is right.

A. The car ferries.

D. 16. Q. Will you enumerate them for the record?

A. The Wabash and Pere Marquette car ferries, and I went from there up to the old——

D. 17. Q. At the Grand Trunk?

A. I did not work at the Grand Trunk.

D. 18. Q. I am not asking where you worked.

A. You mean the different places?

D. 19. Q. Yes. What do you mean by the "car ferries?". That is what I want to know.

Page 121.

A. All right. There were the Wabash and the Pere Marquette, Grand Trunk car ferries, and the passenger and automobile ferries at Walkerville, and the now defunct Windsor ferry, and at the Michigan Central Station; and they paid also at the different warehouses; bonded warehouses.

By Commissioner HOBBS:

D. 20. Q. When you speak of Sunday and holiday service, do you refer only to the time between 8 a. m. and 5 p. m., on Sundays and holidays?

A. No. Put that question again please.

D. 21. Q. When you refer to Sundays and holidays, do you refer only to time on Sundays and holidays between 8 a. m. and 5 p. m.?

A. Yes, sir. That is right.

By Mr. DRYSDALE:

D. 22. Q. Was there any change in the practice at the car ferries since you entered the service?

A. No; not that I know anything about.

D. 23. Q. There was a change at some of the other stations, was there not?

A. Yes.

D. 24. Q. But from the time you entered the service, as I understand your testimony it is that the custom was to pay extra compensation at the car ferries for Sunday and holiday service?

159 Page 122:

A. That is right.

D. 25. Q. Now, when extra compensation was paid for Sunday and holiday services at the car ferries, was it required that the officers first serve their regular contract hours of duty, before receiving such extra compensation?

A. No, he only worked his eight hours.

Commissioner HOBBS. That is not very clear, counsel. It seems to me the answer and the question taken together are not very clear.

(25. Q., and the answer thereto, were read by the reporter.)

Commissioner HOBBS. "He only worked his eight hours," when?

By Mr. DRYSDALE:

D. 26. Q. Will you be more specific on that, and try to answer that question specifically?

A. Well——

D. 27. Q. I will put it another way.

A. Perhaps it would be better.

D. 28. Q. I beg pardon?

A. I say, perhaps it would be better.

D. 29. Q. Whenever Sunday or holiday services were performed at the car ferries, was extra compensation paid for it?

A. Yes.

D. 30. Q. And before the officer became entitled to that compensation, did he have to work actually excess hours, or not?

A. You mean, work in——

Page 123:

Mr. STALEY (interposing): That doesn't mean anything. I object to it.

Mr. DRYSDALE. Repeat the question, and see if it is clear.

Commissioner HOBBS. It apparently was not clear to the witness, because he started to ask you a question to clear it up.

(30. Q. Was read by the reporter.)

A. No; I didn't have to work only eight hours, there.

Mr. DRYSDALE. You have answered.

160 Page 123:

By Commissioner HOBBS:

D. 31. Q. You mean, anything in addition to your regular tour of duty?

A. No; that is all, just the eight hours I worked.

By Mr. DRYSDALE:

D. 32. Q. I will give you a hypothetical question. Suppose you were assigned on a regular tour of duty, regular tour of eight-hour duty, at the car ferries, on Sundays and holidays, did you get extra compensation for it?

A. Yes.

D. 33. Q. Always?

A. Always.

161 EARL A. BUSHEY

12/17/41

Page 100:

6. D. Q. You are one of the inspectors who have been selected by the Detroit customs men to represent them in this overtime litigation, are you not?

A. Yes, sir.

7. D. Q. You helped prepare the schedules, or the Exhibit A—that is, the itemized statement of claim, of the litigants in these 27 cases, did you not?

A. I did.

Page 101:

17. D. Q. Now, during the period of time involved in the plaintiff's claims, namely, from 1931 to 1937, at what stations in Detroit was extra compensation paid for Sunday and holiday services?

Mr. STALEY. You mean to this man?

By Mr. DRYSDALE:

Page 102:

18. D. Q. Do you know?

A. Yes.

Mr. STALEY. I object to his testifying what is paid to other men.

By Commissioner HOBBS:

19. D. Q. Do you know?

Mr. DRYSDALE. He knows what the practice was.

Mr. STALEY. We have before us five claims, if the Court please, and it is a problem what was done with respect to the five men, whose cases are test cases. That was done just to avoid the necessity of going through the records of a large number of men.

Commissioner HOBBS. He will have to testify with respect to his personal knowledge in the matter.

By Mr. DRYSDALE:

20. D. Q. Do you know whether or not at the Port of Detroit extra compensation was paid for Sunday and holiday services at any of the stations during this period?

A. Yes.

21. D. Q. At what stations?

162 Page 102:

21. D. A. The Wabash car ferry, the Pere Marquette car ferry, the Grand Trunk slip dock, and the Michigan Central passenger station.

22. D. Q. Are those stations referred to as the "car ferries"?

Page 103:

A. Yes; the three of them are.

Page 106:

32. D. Q. When you performed services, on Sundays and holidays, at the car ferries, did you always get extra compensation?

A. Yes.

Page 109:

47. X Q. At the time you received your appointment, in 1930, you were assigned 44-hour-week periods of duty?

Page 110:

A. No.

48. X Q. Were you assigned daily 8-hour tours of duty every 24 hours?

A. Yes.

49. X Q. And were those assignments for any hours of any 24?

A. Yes.

50. X Q. And you received no extra compensation for any services rendered during those regularly assigned 8-hour tours of duty?

A. That is—it would depend on the station we were working at, whether the answer would be Yes or No.

51. X Q. What station did it depend on?

A. At the Ambassador or Detroit and Canada Tunnel, we received no extra compensation. At the car ferries that I have mentioned, we regularly received extra compensation.

52. X Q. For services rendered during your regular assigned 8-hour daily tour of duty?

A. That is right. Our schedule was drawn up for two weeks.

163 Page 113:

72. X Q. All right. Now, give me the instances.

A. Any Sunday at the car ferries, on my regular tour.

73. X Q. I am asking you to produce the records.

Mr. DRYSDALE. He is answering the question. Let him go ahead.

Mr. STALEY. No; let him produce the records.

Mr. DRYSDALE. Go ahead, Mr. Bushey, and make the statement you started to make.

A. Any Sunday service at the car ferries or at the Michigan Central passenger depot, I received extra compensation for my regular tour of duty.

By Mr. STALEY:

74. X Q. I want you to give me any records you have there establishing that fact.

A. I do not believe my records will show the evidence that I was paid.

75. X Q. Extra compensation.

A. Just a minute. I have the vouchers here.

Mr. DRYSDALE. I think his testimony is explicit enough that when they worked at the car ferries he got his pay.

COMMISSIONER HOBBS. Let him testify.

Mr. STALEY. I move that counsel's observation be stricken from the record.

Page 114:

Mr. DRYSDALE. I know that there was never any doubt about it, Mr. Staley.

The WITNESS. Right.

Mr. STALEY. There has never been any doubt about anything in connection with the case, in my mind, either. The only difference is, we have a different set of facts.

A. On the 6th of October, for instance, 1935, I worked from 2 a. m. to 11:15 a. m. The voucher shows from midnight 12.01 a. m., to 8 a. m. I received $11.67.

By Mr. STALEY:

76. X Q. And that voucher does not show the work was performed at the car ferries?

164 Page 114:

A. It says at the Wabash boats.

77. X Q. At the Wabash boats?

A. Yes, sir; that is what it says.

78. X Q. Now, will you look at your records and tell me how many hours you had worked during that week, and whether or not that time was in excess of your regular 44-hour assigned week, or beyond or in addition to the 44 hours per week.

A. When would the week start?

79. X Q. I don't know.

A. Would the week start with Sunday, or——

80. X Q. You know how your weeks are handled out there better than I do.

A. There was 48 hours, if I have totaled it correctly, starting with Sunday, October 6, including Saturday, Oct. 12. I can give the hours each day if you want it.

81. X Q. I do not ask it. You do not know when your week of assignments started, do you—what day of the week they count?

A. The new schedule, if that——

82. X Q. (Interposing.) I mean back at that time, in 1935, when does it start—what day of the week?

A. I do not believe I am in position to answer when a week is considered to start. I would consider Sunday.

83. X Q. Do you know how it starts with respect to accounting methods?

A. No; I do not.

84. X Q. Are those hours which appear by the voucher you have consulted, hours of service designated by the assignment sheet for the 2-week period, or not?

A. You asked, the voucher—No.

165 Page 115:

85. X Q. That is, the voucher covers hours of service outside of your regular assignments, by the assignment sheet for that period?

Mr. DEYSDALE. I did not get that. What is that period again?

(85. X Q. Read by the reporter.)

A. The voucher does not agree with the time served.

Mr. STALEY. I am sorry—what is the new answer now?

Page 116:

(Answer to 85. X Q. read by the reporter.)

86. X Q. That, of course, does not apply. What I have in mind is, your assignment sheet usually covers the assignment for the two-week daily tour of duty?

A. That is right; that is right.

87. X Q. Now, what I mean is whether the service which is covered by the voucher is service which would be covered by the assignment sheet for regular tours of duty?

A. That answer is Yes.

88. X Q. That answer is Yes?

A. That's right.

89. X Q. And not outside of the regular tours of duty?

A. No—regular assignment.

90. X Q. And your extra pay is for services rendered—I only want to keep myself straight absolutely—covers services, the hours of which were provided for your being on active duty, by the 2-week assignment sheet?

A. That's right.

Mr. STALEY. All right; that is all.

166 Page 116:

91. R. D. Q. Now, so that I may get clear, Mr. Bushey—when you served a regular tour of duty, on Sundays and holidays, at the car ferries, did you always get extra compensation?

A. Yes. Pardon me, you said Sundays or holidays?

Page 117:

92. R. D. Q. Yes.

A. The answer is Yes.

93. R. D. Q. There is no question about that, is there?

Mr. STALEY. I object to the form of the question.

Commissioner HOBBS. Yes; I sustain the objection.

94. R. D. Q. Has that practice been in effect ever since you have been in the service?

Mr. STALEY. I object to the practice with respect to any other individual. It is different entirely from what the other witnesses have testified.

Mr. DRYSDALE. I understand that has already been passed upon. Will you answer the question?

Commissioner HOBBS. Yes.

A. The practice has not changed.

95. R. D. Q. I beg pardon?

A. There is no change in practice during my time in the service, with respect to Sunday and holiday services at the car ferry.

96. R. D. Q. Have you ever been required to make up these assignment sheets that you refer to?

A. Yes, I have.

97. R. D. Q. What do you call the man who does that?

Page 118:

A. He is one of the employees in the shore office that has supervision over the men on the car ferries. I made up those assignment sheets under the supervision of the man in charge of the shore office. We call them a "two-weeks schedule."

167 Page 118:

Mr. DRYSDALE. I think that is all.

Mr. STALEY. I move that the witness's testimony be stricken out as not coming within the five cases before the Commission. We do not know anything about the records of this man, whereas we have examined the records of the other men.

Commissioner HOBBS. The motion is denied.

168 HARRY W. SMITH

7/21/41

Page 42:

By Commissioner RAMSEYER:

X Q. 149. Mr. Smith, there is just one question. I think maybe you have stated it. On the basis of $2,100 a year, what figure did you take as the daily pay?

A. $5.83.

169. Page 89:

CHARLES C. MARTIN

61. Q. Do you get compensatory time off during the week?
A. Yes, sir.
62. Q. And always have?
A. Yes, sir; we get compensatory time.

170 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court of the United States

No. 142, October Term, 1943

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 143, October Term, 1943

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 144, October Term, 1943

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 145, October Term, 1943

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 146, October Term, 1943

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 142

UNITED STATES, PETITIONER

v.

HOWARD C. MYERS

No. 143

UNITED STATES, PETITIONER

v.

JOHN H. ARBLE

No. 144

UNITED STATES, PETITIONER

v.

CHARLES C. MARTIN

No. 145

UNITED STATES, PETITIONER

v.

WALTER O. PLITZ

No. 146

UNITED STATES, PETITIONER

v.

GEORGE H. SPITZ

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to re-

view the judgments entered by the Court of Claims in the above-entitled cases on February 1, 1943.

OPINION BELOW

The opinions of the Court of Claims are not yet officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on February 1, 1943 (R. 57). A motion for a new trial was overruled on April 5, 1943 (R. 57). The jurisdiction of this Court is invoked under the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTION PRESENTED

Whether, under Section 5 of the Act of February 13, 1911, as amended, the United States is required to pay customs inspectors who perform their regularly assigned tour of duty of not more than eight hours per day and 44 hours per week, not only the base pay for such tour of duty but also extra compensation at double the rate of base pay for such parts of that tour of duty as were performed on Sundays or holidays or between the hours of 5:00 p. m. and 8:00 a. m.

STATUTES INVOLVED

The applicable portions of the statutes involved are set forth in the Appendix, *infra*, pp. 21–24.

STATEMENT

Twenty-seven customs inspectors at the port of Detroit brought separate suits in the Court of Claims to recover extra compensation to which they claimed to be entitled under Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920, c. 61, 41 Stat. 402 (19[illegible] S. C. 267). The parties stipulated that the five claims here involved should serve as test cases for determination of the remaining twenty-two suits (R. 47).

Each of the five respondents was employed by petitioner as a customs inspector at the port of Detroit between September 1, 1931, and August 31, 1937. During that period, they were on duty and rendered service at eight stations at the port of Detroit—situated at ferries, tunnels, a bridge and a dock—where goods, merchandise, passengers and baggage both arrived from and entered Canada.[1] (R. 39–43.) At six of these stations, traffic was open twenty-four hours per day, and at the other two, ferries operated daily from 5 a. m. and 5:30 a. m. to 2 a. m. of the following day (R. 40–41). While each station was open, customs inspection was conducted continuously by three shifts of inspectors (R. 40–41). Their regular assigned tour

[1] The eight stations in question were the Detroit and Canada Tunnel, Ambassador Bridge, Michigan Central Tunnel, Wabash Railway Ferries, Pere Marquette Railway Ferries, Grand Trunk Railway Slip Dock, Detroit and Windsor Ferry, and Walkerville Ferry.

of duty consisted of eight hours per day and 44 hours per week,[2] and for this each inspector was paid the appropriate base salary of $2,100.00 per year (R. 39).

During the period between September 1, 1931, and August 31, 1937, some inspectors worked longer than 44 hours per week. Thus, at four stations,[3] where continuous traffic was the rule and customs service was performed 24 hours per day, the inspectors ordinarily worked 52 hours a week (R. 42). For all such services in excess of a 44-hour week, the inspectors, including respondents, were paid additional compensation at the overtime rates prescribed by Section 5 as amended in 1920 (R. 43, 44, 45, 46).[4] The extra compensation was first collected by the collector of customs from the carrier for whom the overtime services were performed and then remitted by the collector to the inspectors by check drawn against

[2] This was made up of five days of eight hours and one of four. With the enactment of the Saturday Half Holiday Law on March 3, 1931 (46 Stat. 1482, 5 U. S. C. 26a), the 48-hour week then in effect had been reduced to 44 hours and so remained during the entire period here involved (R. 42).

[3] The passenger station at the Michigan Central Tunnel, the Wabash Railway Ferries, the Pere Marquette Railway Ferries, and the Grand Trunk Railway Slip Dock, all of which operated 24 hours per day (R. 41).

[4] In some instances, services in excess of 44 hours per week were compensated by a grant of equivalent time off. No question is here raised as to the adequacy of such form of compensation.

the fund so collected." (R. 42). There is no dispute here as to the adequacy of either the base pay for the regular shift or the extra pay for the additional hours.

However, a portion of respondents' services during their regular daily eight-hour tours of duty in a 44-hour week was performed on weekdays between the hours of 5:00 p. m. and 8:00 a. m., and on Sundays or holidays. It was for the regular services so rendered that respondents sought recovery in the court below of overtime pay in addition to the base pay which they had already received. (R. 43, 44, 45, 46.) Three judges of the Court of Claims held that Section 5 of the 1911 Act as amended required that compensation at the overtime rate be paid by the United States for all services performed at night or on Sundays or

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Section 450 of the Tariff Act of 1930 requires that carriers obtain a special license from the collector of customs to unlade merchandise, baggage, and passengers from their vessels or vehicles on Sundays, holidays, and at night, and Section 451 of that Act requires that such carriers give bond "to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5" of the 1911 Act as amended (see Appendix, *infra*, pp. 21–24). A special license to unlade had been granted by the collector to the carriers here involved and a bond obtained from them in every case in which additional compensation was due and paid to the inspectors for services in excess of eight hours per day and 44 hours per week rendered at night or on Sundays and holidays, pursuant to Section 5.

holidays, even though within the regular tour of duty of eight hours daily and 44 hours weekly (R. 46, 52). The court below accordingly entered judgment in favor of each respondent for approximately double the base pay on account of such services during the period in question[6] (R. 57). The court declined to allow the Government credit for the regular base salary which had already been paid to respondents for the same services[7] (R. 52). Judge Madden dissented from that part of the decision which awarded overtime compensation to the respondents employed at the Ambassador Bridge and the Detroit and Canada Tunnel, on the ground that neither a bridge nor tunnel was a "vehicle" within the meaning of the 1944 Act as amended, nor an "agent" of the users of their facilities for the purpose of requesting the special unlading license and giving bond (R. 55–56).

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[6] The following amounts were found due to each respondent (R. 57):

Howard C. Myers	$13,759.41
John H. Arble	10,219.23
Charles C. Martin	12,225.32
Walter O. Plitz	12,277.94
George H. Spitz	10,267.68

[7] The court found that the base pay would result in the following credits, if the Government were entitled to it as a matter of law (R. 43, 44, 45, 46):

Howard C. Myers	$6,469.93
John H. Arble	4,972.76
Charles C. Martin	5,650.44
Walter O. Plitz	5,833.55
George H. Spitz	4,759.52

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that under Section 5 of the Act of February 13, 1911, as amended, work performed by customs inspectors between 5:00 p. m. and 8 a. m. or on Sunday or holidays constitutes "overtime" for the purposes of overtime rates of pay, even though such work was included in and not in excess of their regularly assigned tour of duty of not more than eight hours daily and 44 hours weekly.

(2) In holding that Section 5 of the Act does not confer power upon the collector of customs to establish regular eight-hour tours of duty within a 44-hour week, comprising in whole or in part work after 5:00 p. m. on week days, or work on Sundays or holidays, without rendering the United States liable for the payment of overtime compensation on account of such regular duty.

(3) In holding that the United States was liable for overtime pay to customs inspectors even though the owner, agent or consignee of the vessel or conveyance involved had not requested or received a special license to lade or unlade at night, Sundays or holidays, and had not executed a bond to pay to the collector of customs the overtime compensation to be turned over to customs inspectors.

(4) In holding that an undertaking to reimburse the United States for overtime pay for

customs inspectors under the Act could be exacted from an international bridge or a vehicular tunnel company.

(5) In failing to give the United States credit, against the overtime compensation allowed on account of services rendered at night or on Sundays or holidays, for the regular base salary already paid to the inspectors on account of the same services.

(6) In failing specifically to find as a fact, that the collector of customs, in order to meet the requirements of continuous service necessitated by continuous international traffic at the port of Detroit, assigned customs inspectors to work daily eight-hour shifts within an established 44-hour week, that services rendered beyond such assigned tours of duty were performed by the customs inspectors at the request of the carrier under a special license from the collector, and that customs inspectors were reimbursed from funds paid to the collector by the carrier for such overtime work.[6]

(7) In entering judgments for the respondents.

REASONS FOR GRANTING THE WRIT

The Tariff Act of 1930 (Appendix, *infra*, pp. 23–24) provides that no merchandise, baggage or passengers arriving in the United States from a for-

[6] This point is not argued further in this petition, but the printed record contains the evidence in support of such a finding, and the Government desires to reserve the point for argument if certiorari is granted.

eign place shall be unladen from the carrying vessel or vehicle on Sundays or holidays or at night (5 p. m. to 8 a. m.) except under a special license granted by the collector (Sec. 450). Before such special license may be granted, the carrier must give bond to indemnify the United States against loss or liability from the granting of such license and to pay the compensation of customs officers and employees assigned to duty in connection with such unlading, in accordance with Section 5 of the Act of February 13, 1911, as amended (Sec. 451). Section 5 of that Act as amended in 1920 (Appendix, *infra*, pp. 21–22) requires the Secretary of the Treasury to "fix a reasonable rate of extra compensation for overtime services of inspectors * * * and other customs officers and employees who may be required to remain on duty" at night or on Sundays or holidays "to perform services in connection with the lading or unlading of cargo" or examination of passengers' baggage. Such rates are to be "fixed on the basis of one-half day's additional pay for each two hours * * * that the overtime extends beyond" 5 p. m. "and two additional days' pay for Sunday or holiday duty." The extra compensation must be paid to the collector of customs by "the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license" to unlade shall be granted, and the collector "shall pay the same to the several customs officers and employees entitled thereto according

to the rates fixed therefor by the Secretary of the Treasury." A proviso vests the collector "where customary working hours are other than" 8 a. m. to 5 p. m. "with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports."

The Court of Claims has interpreted these provisions as entitling customs inspectors at the port of Detroit to recover from the United States, in addition to their base pay, double overtime pay for such portion of their regular tour of duty as was performed at night or on Sundays or holidays, notwithstanding that such services were rendered during and as part of their regular shift of not more than eight hours per day or 44 hours per week, and notwithstanding that no such double compensation was ever demanded or received by the collector from the carrier. In so holding, the court below has decided a question of substantial general importance in a manner inconsistent with the language of the statutes, their legislative history and their long-standing administrative interpretation. Moreover, by according to respondents triple pay for services rendered in the course of regularly assigned tours of duty merely because they were performed between 5 p. m. and 8 a. m. or on Sundays and holidays, the court has conferred upon customs officers and employees a preferred pay status of a highly unusual character, which should not have been done unless predicated

upon statutory language clearly requiring such a result.

1. *The Act authorizes payment of overtime compensation only for services rendered in excess of the regular hours of duty.*—Section 5 of the 1911 Act as amended provides that "the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services" of customs officers and employees "who may be required to remain on duty" between 5 p. m. and 8 a. m. "or on Sundays or holidays." The term "overtime" in its usual and generally accepted sense means time over and above, or in addition to, the regular time normally devoted to the work.[1] And the clause "who may be required to *remain* on duty" is consistent with this usage in suggesting that the employee entitled to the extra compensation must have *remained* on duty after performing his regular services. The Court of Claims, however, rejected this construction and held that the statute in "plain and clear" terms entitled respondents to overtime pay for all work performed between 5 p. m. and 8 a. m., or on Sundays or holidays, even though that work was

[1] Webster's New International Dictionary defines "overtime" as "time beyond, or in excess of, a set limit; esp., extra working time." The term is plainly used in that sense in such kindred legislation as Section 7 of the Fair Labor Standards Act (c. 676, 52 Stat. 1060, 1063, 29 U. S. C. 207) and Sections 1 (c) and 6 of the Walsh-Healey Public Contracts Act (c. 881, 49 Stat. 2036, 2038, 41 U. S. C. 35, 40).

within their regular eight-hour a day, 44-hour a week, tour of duty. The construction adopted below is contrary to the meaning which Congress intended the provision to have, as shown by the legislative history of the measure both before and after its adoption, and by its administrative construction.[10]

The debates on the floor of the House of Representatives between the manager of the 1920 bill and other Representatives show that the object of the bill was to reduce working hours of customs inspectors from 10 hours to 8 hours and to provide for overtime pay for hours worked in excess of that period. 59 Cong. Rec. 2171–3, 2176–8. This overtime pay system was thought preferable to employing additional men to work the odd hours, as a mean of providing for situations where the demands for odd-hour service was intermittent. *Ibid.*, p. 2171. At the Committee hearings, a representative of the Customs Inspectors' Association (the organization at whose request the bill was introduced) stated specifically that there would be no overtime and hence no extra compensation where inspectors were assigned to regular eight-hour shifts at night. Hearings before the House Subcommittee

[10] Even if the statutory language on its face can be deemed susceptible of the construction adopted by the court below, the difficulty of reconciling such interpretation with the normal meaning of the language renders it peculiarly appropriate to resort to extrinsic guides. Cf. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479.

of the Committee on Ways and Means on H. R. 6577, 66th Cong., 1st sess., pp. 9, 13. As the debates referred to above demonstrate, this view was unchallenged and was thought by the Congress which amended Section 5 in 1920 to be implicit in its provisions."

Moreover, the proviso with which Section 5 concludes was added for the express purpose of insuring that work within the eight-hour tour of duty but not performed between the hours of 8 a. m. to 5 p. m. would not be compensated as overtime. Congress' attention was called to the fact that in New Orleans the customary port hours were 7 to 4 instead of 8 to 5; and to avoid a possibility that the hour between 7 a. m. and 8 a. m. would be regarded as overtime the provision was added authorizing collectors of customs to regulate the

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" In 1921 and 1922, the Customs Inspectors' Association was required to defend this provision against attack of the transportation companies, who contended the overtime pay it allowed was excessive. The Association's representative repeatedly assured Congress that the provision authorized overtime pay only for work in excess of 48 hours a week, and that work at nights or on Sundays was not overtime if it was part of the regular 48-hour tour of duty. Hearings, Senate Committee on Commerce, S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 19, 26, 30, 31, 46, 130, 132, 136, 145. On the strength of these representations, Congress not only retained the provision but in the Tariff Act of 1922 extended it to types of transportation not theretofore affected by it. *Mallon* v. *M., St. P. & S. S. M. Ry.*, 11 F. (2d) 332 (App. D. C.), certiorari denied, 271 U. S. 678. Congress was similarly advised while considering the Tariff Act of 1930 (Senate Committee Hearings on Tariff Act of 1930, 71st Cong., 1st sess., p. 494) and retained the provision intact.

hours of customs employees to conform to the prevailing working hours of ports where they differed from those referred to in the bill. 59 Cong. Rec. 2172, 2173, 2177, 2178. The proviso was framed generally, so it authorizes the collectors to fix regular tours of duty of eight hours a day, six days a week, at any period of the day or week where necessary to conform to peculiar local conditions. It was so interpreted by the representative of the Customs Inspectors' Association in his testimony before Congress in 1922 (Hearings, Senate Committee on Commerce, S. 1504, S. 1774 and S. 2188, 67th Cong., 1st and 2nd sess., p. 130), and in 1930 (Hearings before Senate Committee on Tariff Act of 1930, *supra*, p. 494).[12]

The long-standing administrative interpretation is to the same effect. At least since 1900, antedating the enactment of Section 5, continuous 24-hour customs inspection service has been maintained at some border stations; the inspectors working on separate shifts of equal periods. See *International Railway Co.* v. *Davidson*, 257 U. S. 506, 508. The administrative construction of Sec-

[12] Apparently it was similarly interpreted by Congress when, in prescribing regular tours of duty in the Customs Administrative Act of 1938 (c. 679, 52 Stat. 1082), it added (Section 451) that nothing in the Act was intended "to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at night or on Sundays or holidays when such assignments are in the public interest."

tion 5 has been that inspectors on such shifts at night, or on Sundays or holidays, are entitled to overtime only for work in excess of 44 hours (48 hours prior to 1931) per week. See letter from Commissioner of Customs, Appendix, *infra*, pp. 25–26. See also the testimony of the representative of the Custom Inspectors' Association before Congress in 1920, 1921, 1922 and 1930, referred to above, which abundantly demonstrates that customs inspectors' pay was actually computed on that basis in the years mentioned. This administrative construction should not have been disregarded. *Inland Waterways Corp.* v. *Young*, 309 U. S. 517, 525.[1]

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[1] 2 Comp. Gen. 512 (1923), accord; to same effect: 10 Comp. Gen. 487 (1931), under the similar Act of March 2, 1931, c. 368, 46 Stat. 1467, (8 U. S. C., 109a), relating to immigration inspectors' compensation.

[2] The court below relied for its construction of the term "overtime," upon *Ferguson* v. *Port Huron & Sarnia Ferry Co.*, 13 F. (2d) 489, 492 (E. D. Mich.). Although the language in the opinion in that case suggests support of the view espoused by the Court of Claims, the record in the *Ferguson* case discloses that the Collector of Customs was suing to recover from the carrier extra compensation for services rendered on Sundays and holidays, in addition to the regular tour of duty of 48 hours a week which then obtained. See also Hearings before the Senate Committee on Commerce, 67th Cong., 1st and 2d sess., *supra*, pp. 28, 130. In *Mellon* v. *M., St. P. & S. S. M. Ry.*, 11 F. (2d) 332 (App. D. C.), certiorari denied, 271 U. S. 673, injunctive relief was unsuccessfully sought against the Government to prevent it from requiring a special license and exacting a bond of the plaintiff carrier for "the extra compensation to be paid customs officers and inspectors for their overtime services." Brief for

2. *Even if respondents' regular services at night or on Sundays or holidays constitute "overtime", the court below improperly awarded respondents thrice instead of double their base pay for a regularly assigned eight-hour tour of duty.*—Respondents received a base pay of $2,100 annually for performing their regular tour of duty not exceeding eight hours per day and 44 hours per week. The Court of Claims rejected the Government's contention that at least it is entitled to have the base pay received by respondents credited against the extra compensation awarded as overtime. The result was a judgment which, when added to the compensation already paid to respondents, awarded them pay at more than three times the base rate for a regular 44-hour weekly tour of duty.[15] Such a result violates common sense and rejects the logical results of the court's own construction of the statute. For if customs inspectors are entitled

United States, in Opposition, No. 1155, October Term, 1925, p. 5. It is clear that it was for actual overtime beyond the 48-hour week that the Government was seeking to obtain the carrier's bond, and not merely for services rendered as part of a regular tour of duty. Hearings, Senate Committe on Commerce, S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 30-32.

[15] The extra compensation awarded for the "overtime" services is somewhat more than double the base pay. See Findings 8-12. The discrepancy may be accounted for by the fact that under Section 5 the rate of overtime compensation is "one-half day's additional pay for each two hours or fraction thereof of at least one hour" beyond 5:00 p. m. See Appendix, p. 21, *infra*.

to overtime rates for services performed between 5:00 p. m. and 8:00 a. m. and on Sundays and holidays, the rates provided in the Act would obviously supersede the statutory base salary. The base salary having already been paid for such services, the United States is entitled to credit in the amount thereof against the statutory double compensation awarded to respondents. The denial of such credit in effect authorizes the receipt of triple pay for the performance of a regular tour of duty, a result which Congress could hardly have intended, particularly in the light of the overtime rates effective in other branches of Government service.[16]

3. *The judgment below was improper in respect of customs services performed at a bridge or tunnel.*

(a) This Court in *International Railway Co.* v. *Davidson*, 257 U. S. 506, held that Section 5 of the 1911 Act as amended prior to the Tariff Acts of 1922 and 1930 did not apply to customs services rendered on an international bridge, since it is not a "vessel and other conveyance." Nothing in those acts has broadened the scope of Section 5 sufficiently to apply it to services on a bridge or tunnel, for they forbid the unlading of merchan-

[16] Compare Act of May 24, 1928, c. 725, 45 Stat. 725, as amended (39 U. S. C. 828), which allows a 10% increase in pay for certain postal employees for night service; Fair Labor Standards Act and Walsh-Healey Public Contracts Act, under which 1½ times the base pay is fixed for overtime.

dise, baggage and passengers from a "vessel or vehicle" without a special permit, require that application for such permit be made by the owner or agent of the "vessel or vehicle" involved, and apply the provisions of Section 5 to overtime in such unlading. As Judge Madden pointed out in his dissenting opinion below, a bridge or tunnel is not a "vessel or vehicle" and hence is not required to obtain a special license to operate at night or on Sundays and holidays. To apply the overtime provisions of Section 5 to services on such structures would require either that the owner of the tunnel or bridge obtain a special license and give bond for the inspection or unlading of merchandise in which it has no interest as carrier or consignee, or else that license and bond be required of every vehicle or pedestrian using the bridge or tunnel. Such an absurd requirement should not lightly be attributed to the Congress.

(b) Section 5 of the 1911 Act provides that "the said extra compensation shall be paid [to the collector] by the master, owner, agent, or consignee" of the vessel or other conveyance for whose lading or unlading at night or on Sundays or holidays a special license has been issued, and the collector is required to pay such compensation "to the several customs officers and employees entitled thereto." The legislative history of the Act bears out the clear intention that the excess cost for overtime work should be borne

not by the United States but solely by the person benefited, who makes use of the inspection facilities at unusual hours. House Committee on Ways and Means, Hearings on H. R. 9525, 61st Cong., 2d Sess., pp. 462, 463, 464, 470; House Rept. 1657, 61st Cong., 2d Sess.; House Committee on Ways and Means, Hearings on H. R. 6577, 66th Cong., 1st Sess., pp. 9, 13, 18; 59 Cong. Rec. 640; Senate Committee on Commerce, Hearings on S. 1504, S. 1774, S. 2188, 67th Cong., 1st and 2d Sess.; Senate Hearings on H. R. 2667, Tariff Act of 1930, p. 494. The liability to pay the extra compensation arises only when a special license to lade or unlade has been issued to a carrier who has filed bond to pay such costs. The court found that six of the carriers, those operating by tunnel or ferry, had obtained special licenses and filed bonds covering the excess pay, and it was from these six that collections of extra compensation had been received by the collector and turned over to respondents for services in excess of their 44-hour week. No such special license, however, was requested or obtained by either the bridge or the vehicular tunnel to unlade at night or on Sundays and holidays, and neither had posted a bond to reimburse the United States for any excess cost. The judgment below would compel the United States to pay the excess costs of inspection under legislation which Congress believed did not impose such a liability upon the United States.

4. *The decision below is of substantial general importance.*—The statute involved herein is substantially the same in wording as the Act of March 2, 1931, c. 368, 46 Stat. 1467 (8 U. S. C. 109a), extending overtime compensation to immigration inspectors, the Act of May 11, 1938, c. 194, 52 Stat. 345 (46 U. S. C. 382b), extending overtime compensation to local inspectors, shipping commissioners, their deputies and assistants, and customs office employees, and the Act of March 23, 1941, c. 24, 55 Stat. 46 (47 U. S. C. Supp I, 154 (f) (2)), extending overtime compensation to field inspectors of the Engineering Department of the Federal Communications Commission. Presumably the decision below would be authoritative in the Court of Claims under all these acts, if allowed to stand. Moreover, the decision will undoubtedly precipitate a considerable amount of litigation not only under the statute herein but also under these related acts, and we are advised that the total potential recovery against the United States merely with respect to the present statute would be approximately $8,000,000.

CONCLUSION

A writ of certiorari should be granted.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JULY 1943.

APPENDIX

Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920, c. 61, 41 Stat. 402 (19 U. S. C. 267), provides:

> SEC. 5: That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at

night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

Sections 401, 450 and 451 of the Tariff Act of 1930, c. 497, Title IV, 46 Stat. 708, 715 (19 U. S. C. 1401, 1450, 1451) provide in part as follows:

SEC. 401. MISCELLANEOUS.

When used in this title or in Part I of Title III—

(a) *Vessel.*—The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

(b) *Vehicle.*—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

(c) *Merchandise.*—The word "merchandise" means goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited.

(d) *Person.*—The word "person" includes partnerships, associations, and corporations.

* * * * *

(f) *Day.*—The word "day" means the time from eight o'clock antemeridian to five o'clock postmeridian.

(g) *Night.*—The word "night" means the time from five o'clock postmeridian to eight o'clock antemeridian.

SEC. 450. UNLOADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe.

SEC. 451. SAME—EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum

to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled "An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes," approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and

employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday.

* * * * *

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
WASHINGTON

Seal
Office of the Commissioner

Address reply to
Commissioner of Customs

JUNE 4, 1943.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

Attention: Mr. Paul Sweeney

SIR: In connection with the case of *Howard C. Myers* v. *The United States*, in which the Court of Claims has held that customs officers and employees are entitled to overtime compensation under section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (U. S. C. title 19, sec. 267), for services performed at night or on Sundays or holidays on regular tours of duty, representatives of your Department have requested further information from this Bureau as to (1) whether it has ever been the practice at any of the ports to pay overtime compensation for services performed on regular tours of duty, and (2) whether or not, up to the time of the institution of suit in the *Myers* case, the practice of assigning customs employees to regular tours of duty at night

and on Sundays and holidays was in effect at seaports as well as border ports.

It has never been the practice of the Customs Service to pay or collect from parties in interest overtime compensation under the above-mentioned Act for services performed during the regular tours of duty of officers or employees. It has been the practice throughout the country to collect and pay overtime compensation only for services in addition to the 44 hours or 48 hours per week required of the officers or employees for earning their regular pay.

At all times prior to the institution of the suit in the *Myers* case, and until recently when some regular tours of duty have been established because of the war, the practice of assigning customs officers and employees to regular tours of duty at night or on Sundays or holidays for the performance of services within the purview of the above-mentioned Act was not in effect at the seaports but was limited to the ports on the Canadian and Mexican borders where, because of continuous travel, such assignments were in the public interest.

Very truly yours,

[S.] W. R. JOHNSON,
Commissioner of Customs.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 142

UNITED STATES, PETITIONER

v.

HOWARD C. MYERS

No. 143

UNITED STATES, PETITIONER

v.

JOHN H. ARBLE

No. 144

UNITED STATES, PETITIONER

v.

CHARLES C. MARTIN

No. 145

UNITED STATES, PETITIONER

v.

WALTER O. PLITZ

No. 146

UNITED STATES, PETITIONER

v.

GEORGE H. SPITZ

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Claims (R. 47–57) are not yet officially reported.

JURISDICTION

The judgments of the Court of Claims were entered on February 1, 1943 (R. 57). A motion for a new trial was overruled on April 5, 1943 (R. 57). The petition for a writ of certiorari was filed on July 3, 1943, and was granted on October 11, 1943. The jurisdiction of this Court rests upon the provisions of Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

The principal question is whether, under Section 5 of the Act of February 13, 1911, as amended, customs inspectors who perform their regularly assigned tour of duty of not more than 8 hours per day and 44 hours per week, for which they have received base pay, may also recover from the United States extra compensation at approximately double the rate of base pay for such parts of that tour of duty as were performed on Sundays or holidays or between the hours of 5:00 p. m. and 8:00 a. m. If this question is answered in the affirmative, the subsidiary questions presented are—

(1) Whether Section 5 of the Act applies to customs inspectors employed at a bridge or tunnel; and

(2) Whether the base pay received by the customs inspectors, allocable to the period for which extra compensation was allowed, should be credited against such extra compensation.

STATUTES AND REGULATIONS INVOLVED

The applicable portions of the statutes involved are set forth in Appendix A, pp. 67–71; the applicable portions of the regulations involved are set forth in Appendix B, pp. 72-74.

STATEMENT

Twenty-seven customs inspectors at the port of Detroit, including the five respondents, brought separate suits in the Court of Claims to recover extra compensation to which they claimed to be entitled under Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (c. 61, 41 Stat. 402; 19 U. S. C. 267). The parties stipulated that the five claims here involved should serve as test cases for determination of the remaining twenty-two suits (R. 47).[1]

Each of the five respondents was employed by petitioner as a customs inspector at the port of Detroit between September 1, 1931, and August 31,

[1] There have since been filed an additional 150 cases, bringing the total number to 177. The total recovery sought is slightly over $2,000,000.

1937 (R. 39). During that six-year period they were on duty and rendered service at eight stations at the port of Detroit, where goods, merchandise, passengers, and baggage both arrived from and entered Canada[2] (R. 39–43). At six of the eight stations, traffic was open 24 hours per day; and at the other two,[3] ferries operated daily from 5:00 a. m. and 5:30 a. m. to 2:00 a. m. of the following day (R. 40–41). While each station was open, customs inspection was conducted continuously by three shifts of inspectors (R. 40–41). Their regularly assigned tour of duty consisted of 8 hours per day and 44 hours per week,[4] and for this each inspector was paid a base salary of $2,100 per year (R. 39).

During the six-year period between September 1, 1931, and August 31, 1937, some inspectors worked longer than 44 hours per week. Thus, at four stations[5] where continuous traffic was, the

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[2] The eight stations in question were the Detroit and Canada Tunnel, Ambassador Bridge, Michigan Central Tunnel, Wabash Railway Ferries, Pere Marquette Railway Ferries, Grand Trunk Railway Slip Dock, Detroit and Windsor Ferry, and Walkerville Ferry.

[3] Detroit and Windsor Ferry and Walkerville Ferry.

[4] This was made up of five days of 8 hours and one of 4. The 48-hour week in effect prior to March 3, 1931, had been reduced to 44 hours by the Saturday Half Holiday Law (46 Stat. 1482, 5 U. S. C. 26a), and so remained during the entire period here involved (R. 42).

[5] The passenger station at the Michigan Central Tunnel, the Wabash Railway Ferries, the Pere Marquette Railway Ferries, and the Grand Trunk Railway Slip Dock (R. 41).

rule and customs service was performed 24 hours per day, the inspectors ordinarily worked 52 hours a week (R. 42). For all services in excess of a 44-hour week, such inspectors, including respondents, were paid additional compensation at the overtime rates prescribed under Section 5 of the 1911 Act as amended (R. 43, 44, 45, 46). There is no dispute as to the adequacy of either the base pay for the regular shift or the extra pay for the additional hours (R. 43).

However, a portion of respondents' services during their regular daily 8-hour tours of duty in a 44-hour week was performed on weekdays between the hours of 5:00 p. m. and 8:00 a. m. and on Sundays or holidays. It was for the services so rendered that respondents sought recovery in the court below of overtime pay in addition to the base pay which they had already received (R. 43–46). The Court of Claims held that Section 5 of the 1911 Act, as amended, required that additional compensation at the overtime rate be paid by the United States for all services performed after 5:00 p. m. or on Sundays or holidays, even though within the regular tour of duty of 8 hours daily and 44 hours weekly (R. 46, 52). The court below accordingly entered judgment in favor of each respondent for approximately double the base pay already received by him on account of such

services during the six-year period in question[6] (R. 57). The court declined to allow the Government credit against this amount for the regular base salary which had already been paid to respondents for the same services[7] (R. 52). Judge Madden dissented from the part of the decision which awarded overtime compensation to the respondents employed at the Ambassador Bridge and the Detroit and Canada Tunnel, on the ground that neither a bridge nor tunnel was a "vehicle" within the meaning of the 1911 Act, as amended, and Section 450 of the Tariff Act of 1930, or an "agent" of the users of its facilities for the purpose of requesting the special unlading license and giving bond (R. 55–56).

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[6] The following amounts were found due to the several respondents (R. 57):

Howard C. Myers	$13,759.41
John H. Arble	10,219.23
Charles C. Martin	12,225.32
Walter O. Plitz	12,277.94
George H. Spitz	10,267.68

[7] The following base pay was found to have been paid to the several respondents for the periods for which the overtime compensation was allowed (R. 43, 44, 45, 46):

Howard C. Myers	$6,469.93
John H. Arble	4,972.76
Charles C. Martin	5,650.44
Walter O. Plitz	5,833.55
George H. Spitz	4,759.52

SPECIFICATION OF ERRORS TO BE URGED

The Court of Claims erred:

(1) In holding that under Section 5 of the Act of February 13, 1911, as amended, work performed by customs inspectors between 5:00 p. m. and 8:00 a. m. on weekdays, or at any time on Sundays or holidays, constitutes "overtime" for the purpose of overtime rates of pay, even though such work was included in and not in excess of their regularly assigned tour of duty of not more than 8 hours daily and 44 hours weekly.

(2) In holding that Section 5 of the 1911 Act as amended does not confer power upon the collector of customs to establish regular 8-hour tours of duty within a 44-hour week, comprising in whole or in part work between 5:00 p. m. and 8:00 a. m. on weekdays, or work on Sundays or holidays, without rendering the United States liable for the payment of overtime compensation on account of such regular duty.

(3) In holding that the United States was liable for overtime pay to customs inspectors, even though the owner, agent, or consignee of the vessel, conveyance or vehicle involved had not requested or received a special license to lade or unlade at night, Sundays, or holidays and had not executed a bond to pay to the collector of customs the overtime compensation to be turned over to customs inspectors.

(4) In holding that a bond to pay the overtime compensation of customs inspectors under the 1911 Act as amended and Section 451 of the Tariff Act of 1930 could be exacted from an international bridge or a vehicular tunnel company, and that customs inspectors at the bridge or tunnel came within those provisions.

(5) In failing to give the United States credit, against the overtime compensation allowed on account of services rendered at night or on Sundays or holidays, for the regular base salary already paid to respondents on account of the same services.

(6) In failing specifically to find as facts that the collector of customs, in order to meet the requirements of continuous service necessitated by continuous international traffic at the port of Detroit, assigned customs inspectors to work daily 8-hour shifts within an established 44-hour week; that services rendered beyond such assigned tours of duty were performed by the customs inspectors at the request of the carrier under a special license from the collector; and that customs inspectors were paid for such overtime services from funds paid to the collector by the carrier for such additional work.

(7) In entering judgment for the respondents.

SUMMARY OF ARGUMENT

I

Section 5 of the 1911 Act, as amended, imposes no obligation on the United States which would sustain a suit in the Court of Claims under the Tucker Act (28 U. S. C. 250 (1)). Section 5 directs the Secretary of the Treasury to "fix a reasonable rate of extra compensation for overtime services" of customs employees, but the obligation to pay the extra compensation is imposed solely upon "the master, owner, agent, or consignee" of the vessel or other conveyance for which the services are required. The collector is required to pay such compensation to the employees only after receiving it from the carrier, and while the compensation paid to the respondents for their actual overtime services was so received, the compensation, recovery of which was allowed below, was never so received. The legislative history of the 1911 Act and its amendments likewise discloses that Congress intended to impose solely upon the carrier, and not upon the United States, the obligation to pay extra compensation, and the administrative practice bears out this intention. For a period of more than twenty-five years, including the entire period here in suit, customs employees, including respondents, were paid overtime compensation only out of the special fund collected by the collector of customs from

the carriers involved. A cause of action against the United States, cognizable in the Court of Claims, cannot be predicated on the failure of the collector to charge the carriers overtime compensation.

Although the appropriation acts of 1936 and later years allowed the Bureau of Customs to use Government funds to pay overtime compensation to customs inspectors in advance of collection from the carriers, these acts were permissive only and did not purport to impose any liability upon the United States for the payment of such compensation. This construction is illustrated by the fact that throughout the period involved in this action—a period extending for more than a year after adoption of the 1936 appropriation act—the collector at the port here concerned continued the long-established practice of collecting the compensation from the carriers before paying it to the inspectors.

II

The "overtime services" compensable under Section 5 of the 1911 Act, as amended, are those rendered in addition to and not as part of the regularly assigned shift. This accords with the generally accepted meaning of the term and squares with its characterization in the same section as services performed by employees "who may be required *to remain* on duty." This construction of Section 5 is fully supported by the legislative his-

tory of the statute and of later bills *in pari materia* with it.

The evil against which the customs overtime laws were directed, beginning with the first statute in 1873, was the practice of requiring customs inspectors to remain on duty after regular working hours to attend at the unlading of vessels desiring expeditious service. This practice resulted in private negotiation between shipowners and inspectors for the payment of additional compensation, with consequent favoritism and other irregularities. At the debates and hearings in Congress on the 1911 Act and on subsequent legislation broadening the scope of the overtime services compensable at the expense of the carrier, there was virtual unanimity of opinion, by proponents and opponents of the legislation alike, that overtime was payable under the 1911 Act only for additional services performed by customs employees who had already completed their regular shift.

At certain border ports where the traffic was continuous, requiring 24-hour customs inspection service, the practice arose at an early date of assigning separate shifts or platoons of customs inspectors, each working a regular daily shift six days per week; and at no time since the commencement of that practice has the Treasury Department ever collected from a carrier or paid to the employees extra compensation for services performed as part of a regular tour of duty, even

though rendered at night, on Sundays, or on holidays. This administrative practice was repeatedly brought to the attention of Congress at the hearings and debates on the 1911 Act and subsequent legislation, and representatives of both carriers and customs employees conceded its propriety. Indeed, in 1920 Congress expressly approved the practice by adding a proviso to Section 5 of the 1911 Act, authorizing the Treasury Department to establish regular shifts at hours other than 8 a. m. to 5 p. m., where the prevailing working hours at the port in question so required. An attempt in 1937 to prohibit the establishment of regular working hours on Sundays or holidays proved unsuccessful, and a 1938 amendment confirmed the authority of the Secretary of the Treasury to establish regular shifts on such days within a six-day week. The contention of the group of customs inspectors at Detroit, exemplified by the claims in suit, constitutes the first intimation in the voluminous history of the 1911 Act and its amendments that overtime compensation is payable for part of a regular eight-hour shift within a six-day week, merely because it was performed after 5 p. m. or on a Sunday or holiday.

III

Whatever the meaning of the term "overtime services" in the 1911 Act, as amended, it does not apply to customs services rendered at a bridge or tunnel. Section 5 of the 1911 Act, read together

with the related Section 451 of the Tariff Act of 1930, applies solely to customs services rendered in connection with the lading or unlading of vessels, other conveyances, and vehicles. A bridge is neither a vessel nor a conveyance (*International Ry. Co.* v. *Davidson*, 257 U. S. 506) and would seem equally excluded from the normal understanding of the word "vehicle" and from the statutory definition of that term as a "contrivance used * * * as a means of transportation" in water or on land. Those most concerned with overtime compensation for customs inspectors—the associations of customs employees and the carriers footing the bills—were unanimous in the belief, expressed at the hearings in 1937 on a bill to broaden the coverage of the 1911 Act, that a bridge was not covered by the overtime statute as it existed in 1937. For the same reasons an analogous stationary structure such as a tunnel would be excluded from the 1911 Act, as amended. This finds support in the consistent administrative practice not to require from either a bridge or a tunnel a special license or bond for the payment of extra compensation, and not to charge a bridge or tunnel, or to pay to customs employees stationed there, any overtime compensation under the 1911 Act, as amended.

IV

If overtime compensation was payable for such part of a regular tour of duty as was rendered by

respondents after 5 p. m. or on Sundays or holidays, the United States is entitled to be credited with the base pay already paid by it to respondents for the same services. Otherwise respondents would receive compensation at more than three times the base pay for a regular tour of duty of 8 hours per day and 44 hours per week. This result is not only directly opposed to the 1911 Act as interpreted by its sponsor, but results in the anomaly of an employee receiving $2,100 per annum for an eight-hour shift if performed by day, but more than $6,300 per annum for an identical shift if performed at night or on Sundays or holidays. This disparity, without precedent in Government or private industry, is too startling to be attributed to Congress in the absence of more specific statutory direction. Certainly the administrative practice, since the earliest overtime statute, has been to collect and pay extra compensation only for services for which no base pay was received by the employee.

ARGUMENT

Section 450 of the Tariff Act of 1930 (c. 497, Title IV, 46 Stat. 590, 715; 19 U. S. C. 1450) provides that, "No merchandise, baggage, or passengers arriving in the United States" from a foreign place "shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night" (defined by Section 401 of that Act as the time from 5 p. m. to 8 a. m.) "except under special license

granted by the collector [of customs] under such regulations as the Secretary of the Treasury may prescribe." Section 451 provides that, "Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond * * * to indemnify the United States for any loss or liability [from] the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading," in accordance with Section 5 of the 1911 Act, as amended. (See Appendix A, pp. 69–71.)[*] Section 5 of the 1911 Act, as amended, requires the Secretary of the Treasury to "fix a reasonable rate of extra compensation for overtime services of inspectors *, * * and other customs officers and employees who may be required to remain on duty" between 5:00 p. m. and 8:00 a. m. "or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or * * * examination of passengers' baggage."[**] Such "extra

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[*] A special license to unlade had been granted by the collector to the carriers here involved and a bond obtained from them in every case in which additional compensation was due and paid to the inspectors for services in excess of 8 hours per day and 44 hours per week rendered at night or on Sundays and holidays (R. 42–43).

[**] Section 5 requires that such rates "be fixed on the basis of * * * two additional days' pay for Sunday or holiday duty" and, with certain limitations, "one-half day's additional pay for each two hours * * * that the overtime extends beyond" 5:00 p. m. (See Appendix A, p. 67.)

compensation shall be paid" to the collector of customs "by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license * * * shall be granted," and the collector "shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury."[10] (See Appendix A, pp. 67–68.)

The court below held that these statutory provisions entitled customs inspectors at the port of Detroit to recover directly from the United States, in addition to the base pay which they had already received, pay at the overtime rate fixed in the statute for such portions of their regularly assigned shift of 8 hours per day and 44 hours per week as were performed between 5:00 p. m. and 8:00 a. m. on weekdays, or on Sundays or holidays. We contend that this is contrary to the language of the statutes, to the congressional intention underlying them, and to the long-established administrative practice. We further contend that whatever the scope of the provision for extra compensation, the statutes have no application to customs employees at a bridge or tunnel. Finally, even if extra compensation is payable for

[10] Throughout the period here in question, the extra compensation for customs services in addition to 44 hours per week was first collected by the collector of customs from the carrier for whom the overtime services were performed and then remitted by the collector to the inspectors by check drawn against the fund so collected (R. 42).

the services held by the Court of Claims to be "overtime," we contend that there should at least be deducted from such extra compensation that part of the base salary already paid to the inspectors which is allocable to such services.

I

No direct obligation is imposed on the United States by Section 5 of the 1911 Act, as amended, nor by the Tariff Act of 1930, to pay extra compensation for overtime services of inspectors

At the outset the question arises whether the statutes in question create any obligation on the part of the United States to pay the extra compensation sought in these suits, irrespective of the meaning and scope of "overtime services" for which extra compensation is payable.[11] The asserted jurisdictional basis for these suits, apparently brought under the Tucker Act (Section 145 (1) of the Judicial Code, 28 U. S. C., 250 (1)), is that the claims for extra compensation are "founded upon" a "law of Congress," *viz.*, the 1911 Act, as amended, and the Tariff Act of 1930 (R. 2–7).[12] But nothing in those statutes creates an in-

[11] This point was raised below (Brief for United States in Court of Claims, pp. 232–235), and although only inferentially assigned as error in the petition for certiorari (cf. Specifications of Errors No. 2 and 3, Pet. 7), it is argued here because it appears to be jurisdictional in nature. Cf. *Merritt* v. *United States*, 267 U. S. 338, 340–341; *United States* v. *Griffin*, 303 U. S. 226, 229.

[12] Respondents did not assert "any contract, express or implied, with the Government of the United States," and there

dependent obligation on the part of the United States to pay the extra compensation for which suit was brought, an obligation essential to recovery. See *United States* v. *Hvoslef*, 237 U. S. 1, 10; *Medbury* v. *United States*, 173 U. S. 492, 497; *Baltimore Mail Steamship Co.* v. *United States*, 76 F. (2d) 582 (C. C. A. 4), certiorari denied, 296 U. S. 595.

Section 5 of the 1911 Act, as amended, orders the Secretary of the Treasury to "fix a reasonable rate of extra compensation for overtime services" of customs employees, but the extra compensation is to be paid "by the master, owner, agent, or consignee" of the vessel or other conveyance for whose lading or unlading the "overtime services" are required. Under Section 5, the payment is to be made by the carrier to the collector, who is then required to "pay *the same*" to the employees entitled thereto.[13] The legislative history

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is no basis in the record for any such assertion. A contract implied in fact—the only type of implied contract within the jurisdiction of the Court of Claims under the Tucker Act (*Tempel* v. *United States*, 248 U. S. 121; *Sutton* v. *United States*, 256 U. S. 575, 581)—is clearly precluded in the instant case. All respondents were employed at a time when 24-hour inspection services were furnished at the port of Detroit, by three shifts of inspectors on duty 8 hours per day and 44 hours per week, and no overtime was paid for such regular tours of duty whether or not they occurred at night, on Sundays, or on holidays (R. 60, 66, 67; 68, 69). Respondents must have known of this long-established practice and must be taken to have accepted employment on that basis.

[13] Section 451 of the Tariff Act of 1930, requiring a bond from the carrier for whom overtime services are rendered, provides that it shall be "conditioned to indemnify the United

of the 1911 Act as originally enacted, and of later measures relating to overtime compensation for customs inspectors, makes it plain that the obligation to pay the extra compensation was intended to be imposed solely upon the carrier and not upon the United States, and that the only obligation imposed upon the Government was the requirement that the collector of customs distribute to the employees their extra compensation out of the fund collected from the carriers. This was emphasized at the hearings before the House Ways and Means Committee on the bill which became the 1911 Act, and which extended to "storekeepers, weighers, and other customs of-

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States for any loss or liability which might occur or be occasioned by reason of the granting of such special license *and to pay the compensation* and expenses of the customs officers and employees assigned" to overtime duty, "in accordance with" Section 5 of the 1911 Act, as amended. This does not connote that the United States must pay the compensation in the first instance, for the "loss or liability" which might result from granting the special license must be read to cover items distinct from the overtime "compensation" of customs employees; otherwise, an entire phrase in the section becomes surplusage. Examples of "loss" occasioned by the special license, other than overtime compensation payable to employees, may readily be cited, such as revenues lost through smuggling as a result of the granting of the special license. (See Hearings, S. Committee on Finance, 71st Cong., 1st sess., on H.R. 2667, p. 509; Appendix C, pp. 126–127.) The reference to Section 5 of the 1911 Act, as amended, also indicates that the bond secured from the carrier is to cover the obligation imposed on the carrier by that Act. Of course, should the decision below stand, the bond would require the carrier to reimburse the United States to the extent the judgment covered periods to which the bond was applicable.

ficers and employees" the provisions for extra compensation for night services theretofore available only to customs inspectors. Congressman Moore, the proponent and manager of the measure, stated to the Committee (Hearings on H. R. 9525, 61st Cong., 2d sess., pp. 461–463):

> * * * So far as the payment of those not inspectors is concerned, I think the mind of the committee should be disabused of the fact that the Government would be financially affected by the passage of this proposed law. The owner of the vessel pays for this extra work. He is perfectly willing to pay for the extra work. *Not a cent comes out of the Treasury, and you would not be legislating at all with regard to the finances of the Government.* The owner of a vessel comes in and wants to get away, and he asks the privilege of unlading at night between sunset and sunrise, the hours proscribed under the law. He offers a bond and is perfectly willing to pay the inspectors for whom compensation is provided at the discretion of the Secretary of the Treasury, but he can not pay, except in an indirect way, the weighers, the storekeepers, and the watchmen. [Emphasis supplied.]

That the employees were to be paid solely out of the fund collected from the carriers was expressly brought out (Hearings, pp. 464–465):

> Mr. MOORE. I want to say that my understanding of this bill and of that provi-

> sion is that in order to facilitate commerce and to give convenience to the shippers, we have proposed to accommodate them merely in the matter of this night service at their own expense * * *. The only purpose is, as I understand it, to enable a man who wants something done for himself, the owner or agent of a vessel, to say, "I would like the privilege of unlading at night; I would like to use the twelve hours I am now prevented from using; I would like the opportunity of getting away, and I am perfectly willing to pay, through the proper officers, whatever the extra cost may be"; and my purpose, as the proponent of this bill, is to have that fund so created distributed at the instance of the Secretary of the Treasury through the collector of the port * * *. If you put them under the Secretary of the Treasury and systematize the business you have a check upon every dollar received and expended and you have a uniform system of payment which it seems to me is extremely desirable and would tend to avoid abuse.

Because a provision in the bill as introduced, providing for overtime compensation for boarding officers, left some doubt as to whether the carriers or the Government would pay such compensation, the bill was amended explicitly to provide for payment of the compensation "by the master, owner, agent, or consignee of such vessels" (Hearings, pp. 463–465). The same point was

made by the representative of "the customs inspectors and their various associations all over the country," at the hearings before a Subcommittee of the House Ways and Means Committee on the bill which became the Act of February 7, 1920, amending Section 5 of the 1911 Act to its present form (Hearings on H. R. 6577, 66th Cong., 1st sess., p. 13):

> Mr. BOND. * * * You understand the Government pays no overtime. This is overtime which is paid by the steamship companies. * * * this is not costing the Government anything, and the steamship people make no objection to this, and never have made any. * * *

And in the debates on this bill in the Senate, its sponsor stated that the United States would incur "no expense whatever" for the overtime compensation because "the shipowner would pay the collector for it, and then, in turn, the men would be paid by the Government. The scheme * * * meets with the approval of the Treasury Department and the Shipping Board as well; it is also satisfactory to the men who work in the Customs Service" (59 Cong. Rec. 640).[13] The

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[13] Appendix C, p. 90. See, to the same effect, H. Rep. 1657, 61st Cong., 2d sess.; 59 Cong. Rec. 2175, 2178; Hearings, H. Committee on Ways and Means, on H. R. 9525, 61st Cong., 2d sess., pp. 462–465, 469, 473 (Appendix C, pp. 94, 97–98, 78–80).

See also, with respect to later statutes concerning overtime compensation for customs employees, the insistence that the

principal reasons for placing the liability upon the carriers were not only that the carriers, who benefited by the overtime services, should in fairness bear the cost, but also that imposition of the extra compensation would act as a deterrent to unnecessary requests for extra service.[15] For the same reasons, representatives of the Customs Inspectors Association opposed a later bill to place upon the United States the direct obligation to pay overtime at certain ports (Hearings, S. Committee on Commerce, on S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 17, 22, 38–39. 134, Appendix C, pp. 99, 100–101, 104–105, 115), and the bill was not reported out of committee.

The administrative practice under the 1911 Act, as amended, during the entire six-year period in suit (R. 42)—and for many years prior thereto—likewise accords with this construction of Section 5, the employees being paid for overtime services only out of the special fund paid to the collector by the carriers involved.[16] The failure of the col-

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carrier and not the Government pays it. Hearings, S. Committee on Finance, on H. R. 2667, 71st Cong., 1st sess., pp. 481, 483, 502, 504–505, 509, 518–519; Hearings, H. Committee on Ways and Means, on H. R. 6738, 75th Cong., 1st sess., pp. 87, 92 (Appendix C, pp. 120, 122, 125–126, 128–129, 133, 135).

[15] See Hearings, S. Committee on Finance, on H. R. 2667, 71st Cong., 1st sess., Vol. 17, p. 483 (Appendix C, p. 121).

[16] The court below found that during the entire period here involved, the collector of customs collected the extra compensation from the carriers and then remitted the funds to the inspectors by check drawn against the fund so collected (R. 42). This had been the consistent practice for many

lector of customs to collect overtime compensation, which when collected must be paid over to the employees, would not create a cause of action against the United States cognizable in the Court of Claims under the Tucker Act. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 418–419, 423.

Nor was any direct obligation to pay the compensation imposed upon the United States by the appropriation act which, in 1936, made funds available to the Bureau of Customs for payment of the extra compensation directly to customs employees.[17] Besides the fact that the appropriation act was as free as the 1911 Act of any *direction* to the Bureau of Customs to pay the compensation (as contrasted with permission to do so), it required that the payment "at the expense of the parties in interest" shall be "in accordance with the provisions of Section 5" of the 1911 Act, as amended, "and Section 451 of the Tariff Act,

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years. See, for example, the suit brought by a collector of customs against a ferry company for the use and benefit of certain customs employees, to recover extra compensation for overtime services rendered by them at night, on Sundays and holidays (*Ferguson* v. *Port Huron & Sarnia Ferry Co.*, 13 F. (2d) 489 (E. D. Mich.)).

[17] The First Deficiency Appropriation Act, fiscal year 1936 (49 Stat. 1597, 1636), made the appropriation for the Bureau of Customs "available for the payment of extra compensation earned by Customs officers and employees, for overtime services, at the expense of the parties in interest, in accordance with the provisions of section 5" of the 1911 Act, as amended, "and section 451 of the Tariff Act, 1930." A similar provi-

1930."[9] The appropriation act can at most be deemed congressional permission for the initial payment of the extra compensation by the United States, as an arrangement for the convenience of the employees, it can hardly be read to create a claim cognizable in the Court of Claims as one founded upon a "law of Congress." This is confirmed by the fact that throughout the period covered by these suits, and for more than a year after the 1936 appropriation act was passed, the collector at Detroit continued the long-established practice of collecting the extra compensation from the carriers before paying it over to the inspectors (R. 42).

II

"Overtime services" rendered after 5 p. m. and on Sundays or holidays, compensable under Section 5 of the 1911 Act, as amended, mean those in addition to the regularly assigned shift

The court below held that the "extra compensation for overtime services" of customs employees "who may be required to remain on duty between the hours of 5 p. m. and 8 a. m., or on Sundays or holidays," authorized by Section 5 of the 1911

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sion has appeared in all subsequent appropriation acts covering the salaries of customs employees, and administrative practice has since been for the Bureau of Customs to pay the extra compensation and then collect it from the carrier requesting the service.

[9] The 1936 appropriation act also required that the receipts from the carriers for such compensation be "deposited as a refund to the appropriation from which paid."

Act, as amended, is payable for any services rendered after 5 p. m. or on Sundays or holidays, even though rendered as part of the employee's regularly assigned tour of duty not exceeding 8 hours per day and 44 hours per week. This is not only inconsistent with the plain language of the Act but is opposed to the congressional intention disclosed in the legislative history and to the long-established administrative practice.

A. The word "overtime" should be read in its ordinary sense

Section 5 of the 1911 Act, as amended, authorizes extra compensation "for overtime services" of customs officers and employees who may be required to remain on duty between 5 p. m. and 8 a. m. or on Sundays and holidays. The term "overtime" in its usual and generally accepted sense means "extra working time"; that is, working time in addition to the regular time normally devoted to work.[19] That Congress used the word in its familiar sense appears from the fact that the same section describes employees performing the "overtime services" as those "who may be required *to remain* on duty," thus sug-

[19] "One who works more than the usual number of hours per day is said to work overtime." *Cote* v. *Rachelder-Worcester Co.*, 85 N. H. 441, 447. "Overtime," according to *Webster's New International Dictionary*, is "Time beyond, or in excess of, a set limit; esp., extra working time." And according to the *Oxford Dictionary* the term means "Time during which one works over and above the regular hours; extra time."

gesting that an employee entitled to extra compensation must first have performed his regular services. This construction seems inescapable in the light of the last proviso to Section 5, authorizing the collector of customs "in those ports where customary working hours are other than" from 8 a. m. to 5 p. m. on weekdays, "to regulate the hours of customs employees so as to agree with prevailing working hours in said ports" (for example, with the hours of persons such as longshoremen, whose work is related to the services of customs employees). It is clear that this proviso permitted the collector to provide for separate shifts of employees, in order to accord "with prevailing working hours" at the port, and that those shifts were not to be compensated on an overtime basis if the regular working day was not lengthened. Apart from the proviso, Section 5 already empowered the collector to "require" that customs officers and employees "remain on duty" after 5 p. m. or on Sundays or holidays, charging the carrier extra compensation for the "overtime services" rendered. The last proviso added to Section 5 by the 1920 amendment, which expressly disclaims any intention "to affect or alter the length of a working day for customs employees or the overtime pay herein fixed," can only be construed therefore as an additional and separate power, to require a regular tour of duty at these times without the payment of extra com-

pensation. That this was in fact the intention behind the proviso is clear from its legislative history, which will be discussed more fully herein (pp. 38–42).

The Court of Claims rejected the construction suggested above on the ground that the wording of the statute made it "plain and clear" (R. 49) that respondents were entitled to extra compensation for such part of their regular tour of duty as was performed between 5 p. m. and 8 a. m. or on Sundays or holidays. We believe, to the contrary, that a normal reading of the phrase "overtime services," in its context, leads plainly and clearly to the interpretation which we have urged above. But if there is any doubt from a reading of the statute alone, it is fully dispelled by the legislative history—to which, indeed, resort could be had even if the statutory language far more clearly supported the construction adopted below. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479; *United States* v. *American Trucking Ass'ns*, 310 U. S. 534, 543–544; *United States* v. *Dickerson*, 310 U. S. 554, 562.[20]

[20] The pertinent legislative materials are so enlightening on the central points at issue in this case that we have set them out rather fully, for this Court's convenience, in Appendix C, pp. 75–159. Notwithstanding this Court's comment in *Reconstruction Finance Corporation* v. *Bankers Trust Co.*, 318 U. S. 163, 168, footnote 10, as to the relevance of testimony taken at committee hearings, we submit that such testimony is of special assistance when, as here, the stat-

B. The legislative history discloses an intention that extra compensation be paid only for hours worked in addition to the regularly required shift

The legislative history of Section 5 of the 1911 Act and of related statutes in the field of overtime compensation for customs employees leaves no room for doubt that the extra compensation provided for by Section 5 was intended to be paid only for services rendered by the employees in addition to their regular shift, and that no such compensation was payable for services performed as part of a regular shift after 5 p. m. or on Sundays or holidays. The legislative materials are equally clear in demonstrating that Congress was not thought, as respondents have contended, concerned with preserving inviolate their night hours and their Sundays and holidays, nor with providing a premium for working a normal tour at such times.

1. *Legislation to and including the 1920 amendment of the Act of February 13, 1911*

The basic Customs Act of March 2, 1799 (c. 22, 1 Stat. 627), provided that "no goods, wares, or

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ute under consideration forms part of a continuous pattern of legislation extending over nearly 150 years, and when that legislation was in large part the product of conflict between opposing private groups whose views were repeatedly permitted expression in hearings before the interested congressional committees. It should be noted that this Court sought assistance from such materials in construing the same statute in *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 512–513.

merchandise, brought in any ship or vessel from any foreign port or place, shall be unladen or delivered * * * but in open day, that is to say, between the rising and setting of the sun, except by special license from the collector" (Sec. 50, 1 Stat. 665). The Act required customs inspectors "to attend to the delivery of the cargo * * * at all times when the unlading or delivery of goods, wares and merchandise is lawful, particularly from the rising till the setting of the sun on each day, Sundays and the Fourth of July in each year excepted; for which purpose they shall constantly attend and remain on board the vessel * * * or at any other stations where their inspection is necessary" (Sec. 53, 1 Stat. 667).

Since under this statute, which remained in effect for over 70 years, the collector of customs could grant special licenses for unlading at other than the regular hours, customs inspectors were on duty and subject to call 24 hours per day, 365 days per year, and their services could be "appropriated" at any time. By 1871 the granting of special licenses to unlade at other than the usual daytime hours had become customary, and resulted in long working hours and considerable injustice to the customs inspectors. With the common practice of unlading at night and on Sundays and holidays, the customs inspectors were often required to remain on duty all day, Sundays

and holidays.[21] Moreover, the steamship companies, desiring to maintain regular schedules, made a practice of arranging privately with inspectors to pay them extra in order to speed the discharge of the vessels; as a consequence, the rates varied and at times were excessive in amount.[22]

An effort to prevent such private negotiations with inspectors and to place overtime compensation on a more uniform level took the form of the Act of March 3, 1873, 17 Stat. 579.[23] Besides providing for the granting of special licenses by the collector to permit steamships arriving from any foreign port to unlade their cargo at night (between sunset and sunrise), the 1873 Act required the collector to charge the "master, owner, or consignee" of the vessel a "uniform and reasonable rate of compensation" for the services of inspectors assigned to superintend the unlading of the cargo and to collect and distribute the same among the inspectors (see Cong. Globe,

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[21] S. Rep. No. 380, 41st Cong., 3d sess., 1871, and testimony annexed thereto, pp. 42, 69, 139, 158; H. Rep. No. 2708, 57th Cong., 1st sess., p. 2; Hearings, S. Committee on Commerce, on S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 132, 140–141 (Appendix C, pp. 114, 116–117).

[22] S. Rep. No. 380, *supra*, pp. 73, 77, 121, 139, 143; S. Rep. No. 227, 42d Cong., 2d sess., pp. XXVII–XXVIII; see also Hearings, H. Committee on Ways and Means, on H. R. 9525, 61st Cong., 2d sess., pp. 461–462, 468, 472; Hearings, S. Committee on Finance, on H. R. 2667, 71st Cong., 1st sess., Vol. 17, p. 485 (Appendix C, pp. 75–76, 122).

[23] See Hearings, S. Committee on Finance, on H. R. 2667, 71st Cong., 1st sess., Vol. 17, p. 485 (Appendix C, p. 122).

42d Cong., 3d sess., pp. 2009, 2205). The 1873 Act related only to steamships arriving from foreign ports but was later extended to sailing vessels (Sec. 25 of Act of June 26, 1884, 23 Stat. 53, 59); to other conveyances and to the lading as well as the unlading of cargo (Act of June 30, 1906, 34 Stat. 633); and then to customs officers other than inspectors (Sec. 5, Act of February 13, 1911, 36 Stat. 901). The 1911 Act, which replaced the prior legislation, entrusted to the Secretary of the Treasury rather than the collector the fixing of the "reasonable rate of extra compensation for night services" to be charged to the carriers and paid to the employees, and provided that the rate should not exceed "double the rate of compensation allowed * * * for like services rendered by day" (Sec. 5).

During this entire period, the regular working day for customs inspectors, fixed by statute as between sunrise and sunset, was administratively set at 7 a. m. to 6 p. m., in effect a 10-hour day.[24] For this working day, inspectors were paid a stipulated per diem rate.[25] However, this was re-

[24] Hearings, Subcommittee of H. Committee on Ways and Means, on H. R. 6577, 66th Cong., 1st sess., pp. 5–6, 10–12; Hearings, H. Committee on Ways and Means, on H. R. 6738, 75th Cong., 1st sess., p. 186; see Appendix C, pp. 82–83, 140–141.

[25] The pay originally fixed at $2 per diem (Act of March 2, 1799, 1 Stat. 704, 706) was gradually increased to a maximum of $6 in 1909 and $7.80 in 1923 (Act of April 26, 1816, 3 Stat. 306; Rev. Stat. § 2733; Act of April 29, 1864, 13 Stat.

duced to 8 hours in 1920, when Section 5 of the 1911 Act was amended by the Act of February 7, 1920 (41 Stat. 402), in the form in which it is now law (19 U. S. C. 267).

The principal change made by the 1920 amendment was to provide that the extra compensation theretofore payable for night services should be payable instead for "overtime services of * * * customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays."[26]

2. *The Shift or "Platoon" System*

From an early date, traffic conditions at the international borders were such that customs inspectors were required to work at unusual hours,

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61: Act of March 4, 1909, 35 Stat. 1065, Sec. 2; Act of March 4, 1923, 42 Stat. 1453). By the Act of May 29, 1928, 45 Stat. 955 (19 U. S. C. 6 (a)), customs inspectors were given fixed salaries and paid on annual basis. Compensation of respondents is $2,100 per annum, which may be increased by promotion to a maximum of $3,300. Even prior to 1928, when compensation was changed to an annual basis, customs inspectors, regularly employed and paid on a per diem basis, were paid for 365 days (see Hearings, Committee on Ways and Means, on H. R. 6577, 66th Cong., 1st sess., p. 8, Appendix C, p. 84), thus receiving the equivalent of an annual salary.

[26] Other provisions of the 1920 Act provided extra compensation for overtime services rendered in the unlading, receiving, and examination of passengers' baggage and for inspectors' waiting time during overtime periods, and slightly increased the overtime rate for services rendered after 5 p. m.

and where continuous 24-hour customs inspection service was required, the inspectors worked in separate shifts or "platoons."[27] This has been the situation at the port of Detroit since 1885,[28] and the administrative practice there has been to employ three 8-hour shifts of customs employees (R. 40–41).

During consideration of the bill which became the 1911 Act, and on many occasions thereafter

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[27] In 1885 the Report of the Secretary of the Treasury on the Collection of Duties disclosed overtime and night work on the part of customs inspectors at the borders (pp. 138, 156, 166, 188, 220, 256–257, 260). At Suspension Bridge, New York, and at Detroit the shift or platoon system was in effect in 1885 (Report of Secretary of Treasury, *supra*, pp. 260, 170). At least since 1900, continuous 24-hour inspection service has been maintained at toll bridges over the Niagara River, the inspectors working on shifts. See *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 508.

[28] A letter of April 10, 1885, from the Collector of Customs at Detroit, Michigan, to the Secretary of the Treasury (set out in part in Appendix D, pp. 160–162), discloses the situation which obtained at Detroit as of that date. Ferries between Detroit and Windsor and Walkerville operated from sunrise until 10 p. m. or midnight. At the Michigan Central and Grand Trunk Railway freight depots, inspectors worked from 7 a. m. until dark and "very often through the entire night, so that there may be no delay to the railroad traffic." At the railway docks of the Michigan Central and the Grand Trunk Railroads, inspection was conducted on a 24-hour basis, the customs officers being divided into three reliefs working 8 hours each. The boats of these railroads "run *nights*, *days*, and *Sundays*, with *no* cessation whatever, the year through, and *all cars* in transit between east and west arriving at and departing from this port by the Michigan Central, Grand Trunk, and Wabash Railroads are *crossed on these boats*" (Appendix D, pp. 161–162).

in connection with amendatory legislation, Congress and its committees were fully apprised of the "shift" or "platoon system", whereby separate groups of inspectors were assigned to a regular tour of duty at times other than 8 a. m. to 5 p. m. on weekdays. The Government's authority to establish such a system was never questioned, and it was made plain that the extra compensation provided for by the 1911 Act and its successors was not to be payable for services performed on any regular shift, even though occurring at night or on Sundays or holidays; it was only for *extra* services performed in addition to the regular shift, which would be uncompensated by the Government, that the 1911 Act was intended to provide.

Thus, Congressman Moore, the sponsor of the bill which became the 1911 Act, said at the hearings before the House Committee on Ways and Means (Hearings on H. R. 9525, 61st Cong., 2d sess., p. 463):

> The provisions of this bill contemplate the entry of a bond that will enable the owner or agent of a vessel to provide through the collector of the port, at the instance and by the direction of the Secretary of the Treasury, a fund from which these employees of the Government may be paid. They ought to be paid for their extra time. They serve the Government and receive compensation for the service they render, but they are not altogether

serving the Government when they do this work in the night hours; they are serving very largely the owner or the agent of the vessel, who is perfectly willing to pay for the services. Now, it does seem to be a very unfair proposition that the law should specially favor the inspectors of customs with regard to this night work, and should expressly forbid payment to the assistant weighers, storekeepers, watchmen, and others who are necessarily employed upon the work.

(At p. 470):

Mr. FORDNEY. The compensation for night work would be more than twice the compensation for day work?

Mr. MOORE. I think not, but *so long as a man works in the daytime and then continues his work through the night,* if the expense does not come out of the Government he should be paid double. [Emphasis supplied.]

Other congressmen agreed (p. 471):

Mr. BENNET. This bill was called to my attention by a gentleman importing gypsum from Nova Scotia and landing it at Staten Island, which is within the port of New York. That is quite a distance from the island of Manhattan, where the weighers and other officers live, and they find it practically impossible to get the necessary customs officers to go down there. The collector does not feel like ordering them there

> to work all night without any extra compensation *after working all day.* The season for gypsum importation is very short, and they find their business is being very seriously interfered with. * * * [Emphasis supplied.]

When the 1920 amendment was under consideration, changing the standard for extra compensation to "overtime services" performed between 5 p. m. and 8 a. m., or on Sundays or holidays, it was also recognized that payment would be for actual overtime. The representative of the customs inspectors associations, Mr. William H. Bond, testified at the hearing on the proposed 1920 amendment (Hearings, Subcommittee of House Ways and Means Committee, on H. R. 6577, 66th Cong., 1st sess., p. 6):

> Mr. TREADWAY. The idea is, you are first endeavoring to change the present provision from 11 hours to 9, or endeavoring to provide eight hours of work, to follow an eight-hour day, and *that you should get extra compensation for overtime?*
>
> Mr. BOND. Yes * * *. [Emphasis supplied.]

The Assistant Secretary of the Treasury recommended enactment of the legislation in order to compensate inspectors who work overtime inspecting baggage (services not covered until the 1920 Act was passed), and made it plain, in a letter to the chairman of the committee, that the eight-

hour shift system would not entail any extra compensation (Hearings, *supra,* pp. 10–12):

> The department has under consideration a plan whereby boarding officers and inspectors of customs will be assigned to duty in eight-hour shifts and will not, therefore, be called upon to work overtime and no extra compensation paid to officers assigned to the night shift. In order to carry out such plan it will be necessary to secure additional appropriations, and pending the adoption of the plan it will, of course, be necessary to detail inspectors and other employees for night work.
>
> I am of the opinion that when overtime work is required extra compensation should be paid as outlined in the bill now under consideration. I therefore recommend the enactment of this bill into law.

In the congressional debates, the same point was made (59 Cong. Rec. 2171):[29]

> Mr. TREADWAY. * * * The present law provides for a 10-hour day, and here we fix it at 8 hours, with a provision for overtime beyond that.

The "platoon" system was implicitly recognized and approved in the last proviso added by the 1920 amendment to Section 5 of the 1911 Act, vesting the collector of customs, "in those ports where

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[29] See also Hearings on H. R. 9525, pp. 461–463; Hearings on H. R. 6577, pp. 10, 12–13; 59 Cong. Rec. 640, 2171–72, 2176–77. Appendix C, pp. 75–76, 84–85, 87, 90–93, 94–96.

customary working hours are other than" 8 a. m. to 5 p. m. on weekdays, "with authority to regulate the hours of customs employees so as to agree with the prevailing working hours in said ports." This proviso, it was explicitly directed, was not to be construed "to affect or alter the length of a working day for customs employees or the overtime pay herein fixed" (see Appendix A, p. 68). The objective of the proviso was to enable the collectors, where necessary, to fix a working day at hours other than 8 a. m. to 5 p. m. on weekdays without making extra compensation payable therefor. Mr. William H. Bond, President of the National Association of Customs Inspectors, so testified at hearings before the Senate Commerce Committee on S. 1504, a bill to extend to immigration inspectors the overtime compensation provided by the 1911 Act as amended (Hearings on S. 1504, S. 1774 and S. 2188, 67th Cong., 1st and 2d sess. p. 130):

> Mr. BOND. I want to say a word in relation to the distinction Senator Calder mentioned during the hearing as between seaport and frontier work. Of course, I am familiar with the purpose of the legislation which is now the law, because I wrote the bill which was originally introduced, and I changed the bill to meet the desires of the subcommittee of the Committee on Commerce * * *. To meet the condition at New Orleans, where the hours of

labor are from 7 o'clock a. m. to 4 o'clock p. m., this proviso at the end of the bill was put in allowing collectors to adjust the inspectors' hours to the customary working hours at ports where the practices are different. This proviso also applies to the Canadian border at places where traffic is continuous during the 24 hours, such being the "customary working hours"—and the inspectors work in 8-hour shifts without overtime. The same proviso is in the immigration bill, S. 1504, you will note, as in our law.

Senator RANSDELL. Which bill?

Mr. BOND. The existing law, Senator; the act of February 7, 1920. It is just the same as it is in Senate bill 1504. At the end of the bill it states that the collector is at liberty to arrange the hours of inspectors, not more than eight hours a day, to correspond with the customary working hours; and the department rightfully construed that, although it had special reference to New Orleans, it also applied to border ports, where the customary working hours are from 8 o'clock one morning until 8 o'clock the next morning; where traffic is moving across these magnificent structures at Niagara Falls and through these other places, back and forth, all the time. Consequently, at such places we don't work any more than eight hours. The inspectors along the border are satisfied with that. That is the practice everywhere along the border, wherever it can be done, to make

> no charge for overtime service during the weekdays—only for Sundays and holidays. * * * [p. 132] Mr. Stanley has made the statement time after time that these men's work is not overtime until they have completed their regular day's work. We will concede what he has said, but to any man that works six days in the week the seventh day is overtime, according to the gospel or anything else, and he ought to have pay for it when he is working for somebody else's accommodation.[20]

The Association, in a brief filed with the committee, brought out that this proviso permits three shifts without overtime compensation (Hearings, p. 145):

> [Under the last proviso of the 1920 amendment], the Treasury Department has ruled that where railroad, ferry, or bridge traffic is continuous throughout the 24

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[20] The court below was thus in error in holding that the proviso was intended to cover only an exceptional condition at certain ports where the customary working hours of longshoremen were from 7 a. m. to 4 p. m., and analogous situations. The quotation taken from the testimony of Mr. Bond, who drafted the 1920 amendment, shows that although the proviso was placed in the Act at the special insistence of Louisiana congressmen, who called attention to the prevailing working hours of longshoremen at the port of New Orleans, others pointed out that prevailing hours of work might vary from port to port, and the proviso was consequently drafted in language sufficiently broad to authorize even three 8-hour shifts in 24 hours. See Hearings, S. Committee on Finance on H. R. 2667, 71st Cong., 1st sess., p. 494; Appendix C, p. 123.

> hours, those are the "customary working hours," and has placed inspectors on duty in 8-hour shifts, and no charge is made against transportation companies for overtime compensation on week days; the only charge being for Sundays and holidays, days which are universally recognized in all industries to be overtime. * * *

Likewise, in urging a similar bill for immigration inspectors in a later Congress (1929), Mr. George E. Tolman, the representative of the Immigration Inspectors Association, testified (Hearings before Senate Immigration Committee on S. 1126 and H. R. 3309, 71st Cong., 3d sess., p. 22):

> Mr. TOLMAN. There is no desire on the part of immigration officers to be paid overtime for the particular hours in the 24 in which they work—that is, as regards other hours in the 24. That situation is taken care of in these words in the bill [then citing a proviso patterned almost verbatim after the last proviso in the 1920 amendment].

The intended scope of the phrase "overtime services" was made doubly clear at the hearings and debates on bills introduced after 1920, affecting the 1911 Act as amended;[31] and Mr. Bond, who

[31] Principally the Tariff Act of 1922, which extended the provisions for extra compensation to overtime services performed for ferries and railroads at international boundaries; the Tariff Act of 1930, which further extended it to cover all vehicles used as a means of land transportation; and the Customs Administration Act of 1938, which extended it to

drafted the 1920 amendment and who spoke for the largest organization of customs inspectors,[32] asserted without contradiction that overtime compensation was not payable for a regular shift performed in whole or part after 5 p. m., nor for Sunday or holiday work unless it was part of a seven-day workweek. Thus, at hearings before the Senate Committee on Commerce in 1921, on a bill (S. 2188) to exempt railroads, bridges and ferries from the payment of overtime, Mr. Bond testified (Hearings on S. 1504, S. 1774 and S. 2188, 67th Cong., 1st and 2d sess., pp. 29–30):

> Senator NELSON. Let me ask you a question. Is not the man that does night duty immune from day duty?
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> Mr. BOND. Not at all. I am at work at my dock from 8 o'clock in the morning until 5 o'clock in the evening. Then I may con-

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overtime services of customs employees for persons not theretofore covered.

[32] For over a decade commencing in 1919, William H. Bond, a customs inspector of Boston and president of the National Association of Customs Inspectors, was always the principal and at times the only spokesman for the customs inspectors. At the hearings on the Tariff Act of 1930, he was joined by Stuart K. Brandon on behalf of the National Customs Service Association, an organization comprising all branches of the customs service. The statements made by these men to committees of Congress as to the situations which obtained and the manner in which the overtime pay acts were being administered were given great weight, and Mr. Bond was uniformly successful in obtaining the passage of the legislation which he advocated and preventing the enactment of that which he opposed.

tinue on my own ship or perhaps it may be necessary to change to another ship, and I may work all night, as many times I have done, and then report back to my dock and continue working there.

Senator NELSON. But what about the next day?

Mr. BOND. The next day I continue at my work just exactly the same.

Senator FERNALD. Is there but one crew?

Mr. BOND. Just one crew. There are some places on the border where it is practicable to have three 8-hour shifts for railroad work, but there is no other place where that is practicable. * * *

That deals with a place where train service is not continuous at night. At other places, like Buffalo, where trains are in operation at all hours of the 24, the Government maintains three 8-hour shifts of inspectors, and no bills are rendered against the railroad companies except for Sundays and holidays. * * *

As I have already said, at points where railroad train passage is constant during the 24 hours we maintain a 24-hour service in three 8-hour shifts, and no bills are rendered for weekday service against the transportation companies. At these points in Minnesota, according to what you say, Senator, the only overtime is for about two hours in the evening.

Senator NELSON. Let me ask you, where they have three crews, do they get extra time for night work?

Mr. BOND. No, sir; the only bills they render in such case are for the seventh day.

Senator NELSON. And for Sundays, too?

Mr. BOND. For Sundays; yes. That is what I mean when I say that. They render a bill against the railroad company for the seventh day.

Senator NELSON. For double pay?

Mr. BOND. Yes. In some of those places it is not necessary to have three 8-hour shifts, because, as you say, the train arrives early in the evening, and then there is no more business, and it would be foolish for the Government to expend money to maintain three shifts.

Across the river from the port of Buffalo there is a Canadian port, and railroads cross from Canada into this country and from this country into Canada at that point. Our men are retained there in three 8-hour shifts and they have no overtime on weekdays, but they do render bills for Sundays and holidays, for which any man would be entitled to extra compensation.

In urging that the overtime act be extended to inspectors handling freight, the collector at Buffalo wrote (Hearings, *supra*, p. 61):

I believe it more desirable that every employee should have one day's rest in seven, but as long as the men are required to work seven days a week I believe that they are entitled to the overtime pay for

> Sunday and holiday work, and that the act should be made broad enough to include all customs employees who are required to work on Sundays and holidays.'

The carriers attempting to have the law amended to shift to the Government the burden of paying for overtime services rendered to railroads, bridges and ferries,[33] recognized that no overtime was payable where 24-hour customs services were rendered in three shifts, nor where Sunday or holiday work was performed as part of a six-day week consisting of 8-hour shifts, as was the case in Detroit (Hearings, *supra*, pp. 87–89, 95–100, 102, 110–111, 119). The representatives of the customs inspectors agreed (Hearings, pp. 132, 134, 136, 140, 145, 150).

This was again made plain to Congress at the hearings before the Senate Finance Committee on H. R. 2667, 71st Cong., 1st sess., which became the Tariff Act of 1930. Under Section 451 of the Tariff Act of 1922, which was reenacted in substantially the same form in the 1930 Tariff Act, Mr. Bond pointed out that no weekday overtime is paid at Detroit where "the men work in 8-hour shifts," but only "for overtime services which

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[33] This was prior to the decision of this Court that the 1911 Act as amended was inapplicable to bridges (*International Ry. Co.* v. *Davidson*, 257 U. S. 506) and prior to the decision of the Court of Appeals that the Act was likewise inapplicable to railroads (*Mellon* v. *Minneapolis Ry.*, 285 Fed. 980 (App. D. C.)).

they render beyond eight hours a day" (Hearings, pp. 481–482, 487) or for working "seven days a week" (*id.* p. 494; see also *id.* pp. 495–497, 499–500). The Secretary of the Treasury agreed that 24-hour customs service "including such service on Sundays and holidays" would relieve the carriers of any overtime payments (*id.* p. 509). A carrier's representative conceded that such continuous service required merely that the Government have funds available to pay three shifts of employees, and needed no amendment of the customs overtime law (*id.* pp. 518–519).[34]

Approval by Congress of this construction is demonstrated by its action in passing the Tariff Act of 1922 with provisions (Section 450 and 451) extending the overtime provisions of Section 5 of the 1911 Act to railroads and other vehicles, after being explicitly informed of the meaning attached to Section 5 of the 1911 Act and without any amendment of its phrasing, and by its later action in reenacting Sections 450 and 451 of the Tariff Act of 1922 without substantial change as part of the Tariff Act of 1930.[35] Reading the

[34] See also Hearings, S. Committee on Immigration, 71st Cong., 3d sess., on S. 1126 and H. R. 3309 (to enact for immigration inspectors an overtime law such as Section 5 of the 1911 Act as amended) pp. 22, 31.

[35] *Biddle* v. *Commissioner of Internal Revenue*, 302 U. S. 573; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488, *Iselin* v. *United States*, 270 U. S. 245.

1911 Act as amended in the light of the objective to be achieved and the evil to be remedied (cf. *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 512), and with the additional illumination furnished by the legislative materials pertinent to this statute and to those *in pari materia* with it, there is little room for dispute that the intended basis for extra compensation was actual "overtime services" performed by employees who had already completed their regularly assigned shift, and not services performed during a regular 8-hour shift embracing hours after 5 p. m. or work on Sundays or holidays. Of particular significance is the fact that this construction of the 1911 Act as amended was voiced not only by Government officials, congressmen and representatives of the carriers, but also by the representatives and authorized spokesmen for the customs employees themselves; and that against the background of the long-established system of "platoons" at the border ports, which under this interpretation would preclude overtime compensation, the customs employees and their associations never sought to have the statute amended to provide for extra compensation in the situations in which recovery was allowed below.[36]

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[36] Hearings, H. Committee on Ways and Means, on H. R. 9525, 61st Cong., 2d sess., p. 470; Hearings, H. Committee on Ways and Means, on H. R. 6577, 66th Cong., 1st sess., pp. 11, 18; Hearings, S. Committee on Commerce, on S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 26, 30–32, 46–47.

C. The administrative practice

The administrative practice under the customs overtime legislation from its earliest form down through the law as it existed during the period in suit, has been entirely consistent with the construction of the overtime law adopted at the hearings and debates in Congress. A letter from the Bureau of Customs, dated June 4, 1943 (Appendix D, pp. 163–164),[37] states that it has been the consistent practice of the Bureau throughout the country to charge carriers extra compensation for services of customs employees, and to pay the same to the employees, only in instances when actual overtime services were performed by them "in addition to the 44 or 48 hours per week required of officers or employees for earning their regular pay"; and that such extra compensation has never been collected or paid for services rendered by customs inspectors or other employees during their regular shifts, irrespective of whether

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61–64, 87–89, 94–100, 102, 110–111, 119, 132, 136, 137, 150; Hearings, S. Committee on Finance, on H. R. 2667, 71st Cong., 1st sess., Vol. 17, pp. 481, 487, 494–496, 497, 509, 518–519; Hearings, S. Committee on Immigration, on S. 1126 and H. R. 3309, 71st Cong., 3d sess., pp. 22, 31, 33; Hearings, H. Committee on Ways and Means, on H. R. 6738, 75th Cong., 1st sess., pp. 87, 89, 93, 133, 183, 186, 188–189; Hearings, S. Committee on Finance, on H. R. 8099, 75th Cong., 3d sess., pp. 21–22. (See Appendix C, pp. 75 *et seq., passim.*)

[37] As to the propriety of this method of establishing administrative practice, see *United States* v. *Minnesota*, 305 U. S. 382, 390.

the work was performed at night or on Sundays or holidays.

This long-established practice was made known to Congress on numerous occasions, at the hearings and debates on proposed legislation to restrict or extend the 1911 Act as amended in 1920, such as the bills which became the Tariff Act of 1922. The practice of the Customs Bureau, as set forth in its letter of June 4, 1943, was brought out not only by Treasury Department officials but also by spokesmen for the employees themselves. Indeed, representatives of certain carriers who were hostile to the payment of overtime compensation to customs employees attempted to restrict or abolish the overtime law and to that end made every effort to discredit the 1911 Act and the overtime services rendered by inspectors; but such carriers never once contended that extra compensation was demanded from the carrier or paid to the employee for services performed on a regular shift and without actual overtime.[38] Any such practice, if it had existed, would not have been ignored as a weapon against the overtime law.

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[38] Hearings, S. Committee on Commerce, on S. 1504, S. 1774, and S. 2188, 67th Cong., 1st and 2d sess., pp. 87–150, *passim* (Appendix C, pp. 106–120); Hearings, S. Committee on Finance, on H. R. 2667, 71st Cong., 1st sess., pp. 481–482, 487, 494, 500, 509, 518–519; Hearings, S. Committee on Immigration, on S. 1126 and H. R. 3309, 71st Cong., 3d sess., pp. 22, 28, 31; Appendix C, pp. 120–123, 124–125, 126–129, 129–131.

Apparently the first suggestion that extra compensation could be collected and paid for services within the regular tour of duty came from the group of customs inspectors in Detroit, whose position is exemplified by the claims in suit; but it is clear that their complaint was directed against the long-established administrative practice and not against any recent departure therefrom.[39]

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[39] The court below found that during the six-year period in suit (1931–1937) extra compensation was paid at some stations in Detroit for services on Sundays and holidays (R. 42). Any inference that such payment was made for services rendered on Sundays and holidays as part of a regular shift is foreclosed by the findings below that excess pay "for daytime service performed on Sundays and holidays" was paid in connection with "an 8-hour day and a 56-hour week," no excess pay being given "for nighttime service"; and that where services were performed within a 48-hour week, which included daytime or nighttime services on Sundays or holidays, or nighttime services on weekdays, "no excess pay was given" (Finding 6, R. 42). This makes it plain that extra compensation was paid only for services rendered in addition to a regular tour of duty of 8 hours per day and 48 hours per week. The Treasury Department clearly regarded Sunday and holiday service as no different from night service in respect of the payment of extra compensation; in either event, extra compensation was paid for actual overtime only. See letter of June 4, 1943, from Bureau of Customs, Appendix D, pp. 163–164. See also Hearings, Subcommittee of S. Committee on Finance, on H. R. 8099, 75th Cong., 3d sess., p. 64, at which a Treasury Department representative testified that the platoon system at the port of Detroit, at least since 1929, consisted of a regular tour of duty for each employee of not more than 8 hours per day and 6 days per week, Sunday and night work being "rotated among the men." Extra compensation for Sunday and holiday

These contentions were brought to the attention of Congress in 1937 at the hearings on the bill which became the Customs Administration Act of 1938, but they were in effect rejected by the customs employees' associations, the carriers, and by Congress itself. There was then under consideration by the congressional committees Section 8 of the Customs Administration Bill (H. R. 6738 and H. R. 8099, 75th Cong.), which would extend Section 451 of the Tariff Act of 1930 to provide overtime compensation in all cases where customs employees performed extra services outside regular hours of business at the request of vessels, vehicles or common carriers, such compensation to be at the expense of the latter. Hearings, House Committee on Ways and Means on H. R. 6738, 75th Cong., 1st sess., pp. 18–19, 35 (Appendix C, pp. 132–142). During the hearings, it was brought out that overtime compensation is not paid at ports of entry where the Bureau of Customs maintains "regular shifts on duty on nights, Sundays, and holidays" (Hearings, pp. 87, 89, 93) but only for "overtime work" where there are no separate shifts (*Id.* p. 92, 133). Representatives of the Treasury Department and of the customs employees agreed that the proposed broadening of the overtime law was not intended to alter, and should not alter, the practice of not paying

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work was paid only "to customs inspectors who had already served on their regular tours of duty." (*Id., ibid.*)

"overtime compensation * * * when there is a regular shift on duty" (*Id.* p. 133). The proposed amendments to Section 451 of the Tariff Act of 1930 were characterized by a representative of the National Customs Service Association as a clarification of "existing law so as definitely to present a statutory basis for the present administrative practice of not requiring payment of overtime compensation to customs officers at border ports, who are working in shifts, and who therefore work a full week, but at other than regular hours, and who do not at present participate in overtime compensation" (*Id.* pp. 180–181).

The association of customs employees believed that such employees should not have Sunday or holiday work made a part of their regular weekly tour of duty, and their representatives accordingly proposed an amendment to prohibit the assignment of customs employees "to regular duty on Sundays or holidays either by day or at night, in compliance" with the request of carriers (*Id.* pp. 181–183, 185). Objections were raised that this amendment would impair "the authority of the Treasury Department to assign officers on regular tours of duty on Sundays or holidays. In order to make certain that such authority * * * was to remain unimpaired," the proposed amendment was rejected in favor of a proviso that—

> Nothing in [section 8] shall be construed to impair the existing authority of the

> Treasury Department to assign customs officers or employees to regular tours of duty at nights or on Sundays or holidays when such assignments are in the public interest. (Hearings before Subcommittee of Senate Committee on Finance, on H. R. 8099, 75th Cong., 3d sess., p. 61).[40]

The customs employees association finally accepted this provision (*Id.* p. 61). During the debates on the floor of the House, it was pointed out that this proviso was intended "to preserve the existing authority of the Treasury Department to make such assignments" of customs officers and employees "to regular tours of duty at night or on Sundays or holidays" and thus preclude the collection of additional compensation. 81 Cong. Rec. 9391–9392.

At the hearings before a Subcommittee of the Senate Committee on Finance on the bill which had passed the House, attention was directed to the contention of an organization of customs employees at Detroit that inspectors were entitled to overtime for all services rendered between 5 p. m. and 8 a. m., and on Sundays or holidays, even though "performed during regular 8-hour tours of duty" (Hearings on H. R. 8099, 75th Cong., 3d sess., p. 64). The representative of the association of customs employees did not support this view, but supported the proviso as it had passed

[40] These were the continued hearings on the Customs Administration Act of 1938, this time on the successor bill to H. R. 6738.

the House, describing it as "crystallizing the present situation as to overtime compensation at border points, and leaving the Department full discretion to deal with those matters as the public interest may require" (Hearings, p. 61). The provision became law. 52 Stat. 1082, 19 U. S. C. 1451.

The 1938 amendment to the overtime law thus possesses significance virtually dispositive of the question here presented. The background of this amendment, was the long-established administrative practice clearly brought to the attention of Congress: that at border ports where continuous custom inspection was required, shifts or platoons were maintained consisting of regular tours of duty of eight hours daily and six days weekly; and that no overtime compensation was paid for any part of such tour of duty rendered at night or on Sundays of holidays. The 1938 amendment, confirming the authority in the Treasury Department to set up such platoon systems where the public need required—and to include Sunday and holiday work in the regular shift—by the same token constitutes approval of the administrative construction placed by the Treasury Department [a] upon the 1911 Act as amended. See

[a] The 1938 Customs Regulations also removed the doubt engendered by the claims in suit, by providing that no extra compensation was authorized for a regular tour of duty performed at night or on Sundays or holidays (Art. 1242 (g); Appendix B; *infra*, p. 74).

Inland Waterways Corp. v. *Young*, 309 U. S. 517, 525, and cases cited n. 35, *supra*.

The conclusion below, that any work done as part of a regular shift after 5 p. m. or on Sundays or holidays, constitutes "overtime services" compensable under Section 5 of the 1911 Act as amended, is in our view rendered quite indefensible by the legislative history and the administrative practice under that Act.[42]

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[42] The court below (R. 50) relied upon *Ferguson* v. *Port Huron & Sarnia Ferry Co.*, 13 F. (2d) 489 (E. D. Mich.), in which the district court stated that overtime as used in the statute "was intended to express the meaning: 'beyond the regular, fixed working hours.'" But that language, when read in the light of the problem before the district court, is far from support for the conclusion below. That case involved a suit brought by the collector of customs for the use and benefit of certain customs employees to recover overtime compensation for Sunday and holiday services, and the defense was based primarily upon the contention that an inspector was not entitled to overtime pay on Sundays and holidays unless he had "first earned his regular pay for such day by working during the regular hours on that day." (13 F. (2d) at 492). It was to that argument that the court addressed its observations. The inspectors in question worked in 8-hour shifts, but there was no question of extra compensation for regular tours of duty at unusual hours, for the consistent practice was to charge carriers only for actual overtime. (Hearings, S. Committee on Commerce on S. 1504, 67th Cong., 1st and 2d sess., p. 100; Hearings, S. Committee on Finance on H. R. 2667, 71st Cong., 1st sess., p. 482; Appendix C, pp. 110–111, 120–121). There is nothing in the facts of that case contrary to the construction for which the Government here contends.

Likewise, the dictum by this Court in *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 510–511, that "this substituted

III

Section 5 of the 1911 Act as amended does not apply to services rendered at a bridge or tunnel

Our argument up to this point, if correct, would require reversal of the entire judgment below. If we are mistaken in our position that "overtime services," to be compensable at the extra rate, must be rendered in addition to a regular tour of duty, we submit that respondents were not entitled to recover extra compensation for services performed at unusual hours at the bridge and the tunnel.

The 1911 Act as amended in 1920 applied solely to customs services connected with "any vessel or other conveyance," and the "extra compensa-

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section [Sec. 5] defines what shall be deemed overtime," must be read in its context as denoting the periods within which actual overtime was compensable rather than the periods in which any service of itself constitutes overtime. *Mellon* v. *Minneapolis Ry.*, 11 F. (2d) 332 (App. D. C.), certiorari denied, 271 U. S. 678, on which respondents relied below, merely involved the question of whether the Tariff Act of 1922 had made Section 5 of the 1911 Act as amended applicable to the unlading of the baggage of passengers arriving by train (the same court having held prior to the 1922 Act that such unlading was not covered by Section 5, *Mellon* v. *Minneapolis Ry.*, 285 Fed. 980). The court of appeals concluded that the 1922 Act had so changed the law and that overtime compensation could be collected from the railroads if they undertook to unlade passengers and baggage at unusual hours. 11 F. (2d) at 334–335. The court was not called upon nor did it undertake to pass upon whether customs employees working on regular 8-hour shifts not exceeding 48 hours a week were entitled to compensation.

tion" for overtime services was to be paid by the "master, owner, agent, or consignee of such vessel or other conveyance." This Act was held to be inapplicable to an international toll bridge, because "the words 'vessel or other conveyance' are not appropriate to describe the plant of a toll-bridge." *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 512. It was likewise held inapplicable to the unlading of passengers' baggage from railroads. *Mellon* v. *Minneapolis Ry.*, 285 Fed. 980 (App. D. C.). However, the Tariff Act of 1922 repealed Sections 1–4 of the 1911 Act, which required a special license and bond in order to lade or unlade, and substituted similar requirements applicable to any "carrying vessel or vehicle," defined to mean every description of watercraft, carriage "or other contrivance used, or capable of being used, as a means of transportation" in water or on land, exclusive of aircraft (Secs. 401, 450, 451; 42 Stat. 858, 948, 954).[*] This concomitantly broadened Section 5 of the 1911 Act as amended and made it applicable to railroads. *Mellon* v. *Minneapolis Ry.*, 11 F. (2d) 332 (App. D. C.), certiorari denied 271 U. S. 678.

There is, however, nothing in the Tariff Act of 1922 nor any subsequent legislation which made Section 5 of the 1911 Act applicable to a bridge

[*] These provisions were reenacted in the Tariff Act of 1930 (Secs. 401, 450, and 451; 19 U. S. C. 1401, 1450, 1451), in effect during the period in suit.

or tunnel. The terms "vehicle" and "a contrivance used as a means of transportation" may be sufficiently descriptive of a railroad; they are hardly apt to describe a bridge, especially after the decision of this Court expressly holding a bridge not to be a "conveyance" under the 1911 or 1920 Act. Nor can merchandise, baggage and passengers passing over or through a bridge or tunnel be said to be "unladen" therefrom (see Tariff Act of 1930, Sec. 450). Indeed, to hold a bridge or tunnel to be a "carrying vehicle" under the statute would create the problem of whether the bridge and tunnel, or the actual "vehicle" moving over it, are required to give bond, obtain the license, and pay the extra compensation for overtime customs services relating to the lading or unlading of baggage or cargo carried by the moving vehicle. These difficulties suggest the absence of any intention to cover bridges or tunnels in the 1911 Act or the Tariff Act of 1922. Since the decision of this Court in *International Ry. Co.* v. *Davidson*, 257 U. S. 506, holding the 1911 Act as amended inapplicable to a toll bridge,[*] no attempt, so far as we are aware, has been

[*] This Court observed in that case (p. 515) that "to impose upon the company the obligation of furnishing an indemnity bond covering losses which may accrue to the Government from the action, not of the bridge company or of its employees, but of any passenger who crosses the bridge was clearly unreasonable."

made to require a bridge to obtain a special license to unlade and to give bond, nor has any such request ever been made of an international tunnel.[45]

At hearings and debates in Congress in 1937, there was apparent unanimity of opinion that the then existing customs overtime law did not apply to a bridge or tunnel. There was under consideration a provision in H. R. 6738 (the predecessor of H. R. 8099 which became the Customs Administration Act of 1938, 52 Stat. 1077), amending Section 451 of the Tariff Act of 1930. The proposed amendment (Section 8 of the bill) would *inter alia* extend the overtime provisions to overtime services performed at the request of "a common carrier or the owner or consignee of any merchandise," as well as at the request of the owner or master of a vessel or vehicle. Hearings, House Committee on Ways and Means on H. R. 6738, 75th Cong. 1st sess., pp. 18–19. In discussing this amendment, a representative of the National Customs Service Association stated, with-

[45] The court below found that the six carriers which were railroads and ferries had obtained special licenses and filed bonds covering extra compensation for overtime services, and it was from these six that extra compensation had been collected by the collector and turned over to respondents for services rendered in excess of their 44-hour week. No such special license, however, was requested or obtained by either of the other two carriers—the bridge and the vehicular tunnel—to unlade at night or on Sundays and holidays, and neither had posted a bond to reimburse the United States.

out any expression of disagreement from anyone on the committee, that the overtime law then did not apply to bridges and tunnels (*Id.* pp. 188–189). At the debates in the House on the bill as it was reported out of committee, it was observed that the proposed Section 8, broadening the category of persons required to pay overtime compensation would make the law applicable to international bridges; an amendment was proposed to obviate that result (81 Cong. Rec. 9391–9392). And at the hearings on the successor bill, (H. R. 8099) before a Subcommittee of the Senate Finance Committee (75th Cong., 3d sess.), it was again noted that existing law did not authorize charging "the bridge companies for overtime services on international bridges" (Hearings, pp. 21–22), and both the representative of the customs employees and the representative of the Treasury Department agreed (Hearings, pp. 63–64).

In this context, the enactment of the 1938 amendment to Section 451 of the Tariff Act of 1930 (19 U. S. C. 1451), coupled with the consistent administrative practice, supports the view of the dissenting judge below that the 1911 Act, as amended, in the form in which it was in effect during the period here in question, was not intended to apply to overtime services of customs employees at a bridge or tunnel.

Other considerations argue strongly against the construction of the statute adopted below. To

require a special license and bond of every person or vehicle using the bridge or tunnel would virtually destroy their usefulness (see Judge Madden, dissenting in part, R. 55–57). And to require that the bridge or tunnel obtain a special license and give bond for overtime customs services rendered to the vehicular traffic using its facilities would have the unreasonable effect of subjecting the owners of the bridge or tunnel to a liability measured solely by the customs inspection requirements of persons over whom they have no control. Cf. *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 515. Moreover, it would be supportable only upon the fictional theory—unfounded in the record—that the bridge or tunnel was the "agent" of the vehicle using it.[46]

We respectfully submit, therefore, that the 1911 Act as amended does not apply to customs services performed at a bridge or tunnel, which

[46] The statute requires that application for the special license be made by the "master, owner, or agent, of such vessel or vehicle", and the extra compensation is to be paid by the "master, owner, agent, or consignee" thereof. These terms, at least with reference to vessels, the original ambit of the phrase, have a well-accepted meaning, representing a definite legal relationship between the vessel or vehicle and its cargo on the one hand, and the person or persons enumerated on the other. No similar or even analogous relationship exists between a bridge or a tunnel and a vehicle passing over or through it. It has never been contended that the bridge or tunnel became the agent of the vehicles by any consensual act, and there is nothing in the record to support such an agency.

were not required to obtain and did not obtain special licenses to unlade.[47]

IV

In awarding extra compensation for "overtime" services the court below erroneously failed to allow credit for that part of the base pay already received by respondents for such services

Respondents received a base pay of $2,100 annually for performing their regular tour of duty consisting of not more than 8 hours per day and 44 hours per week. (Customs Regulations 1937, Art. 1462; Appendix B, *infra*, pp. 73–74.) The Court of Claims rejected the Government's contention that if extra compensation is recoverable for services rendered as part of a regular tour of duty, it is entitled to have the amounts which it paid to respondents as base pay for the same services credited against the recovery (R. 52, 57). The result was a judgment which, when added to the base compensation already paid to respondents, awarded respondents pay at more than three times the base rate for a regular 44-hour weekly tour of duty.[48] Such a holding is directly op-

[47] Inasmuch as all services involved in the instant case were rendered prior to 1938, we are not here concerned with the 1938 amendment to Section 451 of the Tariff Act (Appendix A, p. 71), except insofar as its legislative history sheds light on the proper construction of the 1911 Act as amended.

[48] The extra compensation awarded for the overtime service is somewhat more than double the base pay (R. 43–46). The discrepancy may be accounted for by the fact that under

posed to the interpretation of the statute by its sponsor in Congress.—The 1911 Act, according to its sponsor, Congressman Moore of Pennsylvania, was intended to provide compensation for night services which, without the Act, would be performed "without any compensation at all" (Hearings, House Committee on Ways and Means on H. R. 9525, 61st Cong., 2d sess., pp. 461–463, 467–469). Mr. Moore stated (*Id.* p. 466):

> Mr. MOORE. Suppose a man for day work gets $3.50, for night work under this provision he would get $7. * * * I do not want you to think that we are trying to get three times the day pay for extra work at night.
>
> The CHAIRMAN. I did not understand anything of the kind.
>
> Mr. MOORE. A man who is on duty all day and who has to work all night ought to have extra compensation for the extra night work. It is excessive and extra, and he is perhaps entitled to more compensation. As modern conditions go——
>
> The CHAIRMAN. I understand that is the usual compensation demanded by labor unions throughout the country?

(At p. 470):

> Mr. FORDNEY. The compensation for night work would be more than twice the compensation for day work?

Section 5, the rate of overtime compensation is "one-half day's additional pay for each two hours or fraction thereof of at least one hour" beyond 5 p. m.

> Mr. MOORE. I think not, but so long as a man works in the daytime and then continues his work through the night, if the expense does not come out of the Government he should be paid double.

The fact that the compensation for overtime is called "extra compensation" does not preclude giving effect to the congressional intention, for it is "extra" in the sense that it is added to the compensation payable for the regular services at the usual hours. The denial of the credit for base pay results in the anomaly of compensation at the rate of $2,100 per annum for a customs inspector who performs services during an 8-hour shift between 8 a. m. and 5 p. m. on weekdays, and compensation at the rate of more than $6,300 per annum for a customs inspector who performs identical services during an 8-hour shift at night or on Sundays or holidays. The disparity between these rates is too startling to be attributed to Congress without more specific language in the statute, particularly in the light of the overtime rates effective in other branches of Government service.[49] The absence of any precedent for such a disparity, either in the Government or in private industry precludes stretching the language of the

[49] Compare Act of May 24, 1928, c. 725, 45 Stat. 725, as amended (39 U. S. C. 828), which allows a 10% increase in pay for certain postal employees for night service; Fair Labor Standards Act and Walsh-Healey Public Contracts Act, under which 1½ times the base pay is fixed for overtime.

1911 Act or its 1920 amendment to authorize it here.[50]

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment below should be reversed and the case remanded with instructions to dismiss the complaint.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
CHESTER T. LANE,
J. FRANK STALEY,
DAVID L. KREEGER,
Special Assistants to the Attorney General.
PAUL A. SWEENEY,
Attorney.

ROBERT CHAMBERS,
Chief Counsel,
FRED M. IVEY,
Attorney,
Bureau of Customs.

DECEMBER 1943.

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[50] The paucity of the legislative history on this point may be attributed to the fact that the "extra compensation" was generally thought by all concerned to be payable only for actual overtime services, hence for services for which no base salary had been paid. See pp. 35–45, *supra.*

APPENDIX A

STATUTES

Section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (c. 61, 41 Stat. 402; 19 U. S. C. 267), provides:

> SEC. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other convey-

ance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

Sections 401, 450, and 454 of the Tariff Act of 1930 (c. 497, Title IV, 46 Stat. 708, 715; 19 U.

S. C. 1401, 1450, 1451) provide in part as follows:

SEC. 401. MISCELLANEOUS.

When used in this title or in Part I of Title III—

(a) *Vessel.*—The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

(b) *Vehicle.*—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

(c) *Merchandise.*—The word "merchandise" means goods, wares, and chattels of every description and includes merchandise the importation of which is prohibited.

(d) *Person.*—The word "person" includes partnerships, associations, and corporations.

* * * * *

(f) *Day.*—The word "day" means the time from eight o'clock antemeridian to five o'clock postmeridian.

(g) *Night.*—The word "night" means the time from five o'clock postmeridian to eight o'clock antemeridian.

* * * * *

SEC. 450. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such

regulations as the Secretary of the Treasury may prescribe.

SEC. 451. SAME—EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled "An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes," approved February 13, 1911, as amended. In lieu of such bond the owner, or agent, of any vessel or vehicle or line of vessels or vehicles may execute a bond in a penal sum to be fixed by the Secretary of the Treasury to cover and include the issuance of special licenses for the unlading of vessels or vehicles belonging to such line for a period of one year from the date thereof. At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such

customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday.

* * * * *

Section 9 of the Customs Administration Act of 1938, c. 679, 52 Stat. 1077, 1082 (19 U. S. C. 1451) provides:

SEC. 9. So much of the last sentence of section 451 of the Tariff Act of 1930 (U. S. C., 1934 edition, title 19, sec. 1451) as precedes the words "gives a bond in a penal sum to be fixed by the collector" is hereby amended to read as follows: "Upon a request made by the owner, master, or person in charge of a vessel or vehicle, or by or on behalf of a common carrier or by or on behalf of the owner or consignee of any merchandise or baggage, for overtime services of customs officers or employees at night or on a Sunday or holiday, the collector shall assign sufficient customs officers or employees if available to perform any such services which may lawfully be performed by them during regular hours of business, but only if the person requesting such services"; and the said section 451 is further amended by adding at the end thereof the following: "Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at nights or on Sundays or holidays when such assignments are in the public interest."

APPENDIX B

Customs Regulations 1937

OVERTIME SERVICE

710 ART. 1242.[1] *Extra compensation.*—(a) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise, or lading cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo or merchandise on or from the wharf, or in connection with the unlading, receiving or examination of passengers' baggage, or in boarding vessels, or in the entrance and clearance of vessels, or in the issuance and recording of their marine documents and instruments of title, shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company. * * *

(c) The rates of extra compensation are payable in cases where the services of customs officers or employees have been duly requested and the officers or employees have reported for duty, even though no actual service may be performed.

(d) Customs officers and employees should be ordered to report for duty sufficiently in advance of the expected arrival of a train or vessel to

[1] Art. 1242 is substantially the same as Art. 1228 of the 1931 regulations, and Art. 1462 is substantially the same as Art. 1446 of the 1931 regulations.

properly safeguard the revenue. However, waiting time should be reasonable and compatible with the circumstances in each case.

(e) The extra compensation for overtime services is in addition to the regular compensation paid by the Government in the case of officers and employees whose compensation is fixed on the ordinary per diem basis and those receiving a compensation per month or per annum.

(f) Extra compensation for "waiting time" will not be allowed unless and until an officer or employee actually reports for duty. * * *

809 ART. 1462.[1] *Hours of service.*—(a) The official hours of officers, clerks, examiners, and employees, except those hereinafter specified, will be from 9 a. m. to 4:30 p. m., with a half hour for lunch.

(b) The official hours of the following employees will be: Staff officers, station inspectors, and inspectors to whatever duty assigned, sugar samplers, samplers, laborers, storekeepers, and outside messengers, from 8 a. m. to 5 p. m., 1 hour for lunch; verifiers-openers-packers and openers and packers, 8 a. m. to 4:30 p. m., one-half hour for lunch; customs guards not less than 8 hours.

(c) The above hours may be extended as the needs of the service demand, and such extension shall be without additional compensation, except as provided for in the act of February 13, 1911, as amended by the act of February 7, 1920.

(d) The act of February 7, 1920, also provides that in those ports where customary working hours are other than those above mentioned, the

[1] See footnote on p. 72.

collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said port, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working-day for customs employees or the overtime pay fixed for such employees. * * *

T. D. 49658, published July 21, 1938, p. 101:

Article 1242 (a) is amended to read as follows:

> (a) Customs officers and employees performing services at night, or on a Sunday or holiday, in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, provided a special license therefor has been granted, or performing any other services at night or on a Sunday or holiday which may lawfully be performed by them during regular hours of business, provided a request therefor has been made, shall receive extra compensation for overtime services, which extra compensation shall be reimbursed to the Government by the person to whom the special license was granted or by whom the overtime services were requested.

Article 1242 (g) is amended to read as follows:

> (g) Extra compensation is not authorized for any service performed by a customs officer or employee pursuant to his assignment to a regular tour of duty at night or on a Sunday or holiday.

APPENDIX C

1. Hearings before the Committee on Ways and Means, House of Representatives (61st Cong., 2d sess.), on H. R. 9525 (the companion bill of S. 6011, which became the Act of February 13, 1911, c. 46, 36 Stat. 899)

STATEMENT OF HON. J. HAMPTON MOORE, A MEMBER OF CONGRESS FROM THE STATE OF PENNSYLVANIA

461–463 Mr. MOORE. Mr. Chairman and gentlemen of the committee, the bill was introduced at a preceding session of Congress, and has been reintroduced in this Congress because there seems to be a demand for it at the various ports of the country, owing to the inability of the owners of vessels, consignees, agents, and others to take advantage of the nighttime to discharge their cargoes. The existing law provides that under certain conditions, the entry of a bond, for instance, the collector of the port may permit the owner or captain of a vessel to proceed to unlade between sunset and sunrise. It provides that there shall be compensation to those who engage in this work at the instance of the collector, but names only inspectors.

It has been found that in the discharge of a cargo it is necessary to employ assistant weighers, storekeepers, and others, but no provision whatever is made for their payment. For a time this lapse of the law was provided for by voluntary arrangement between the owner of the vessel and the col-

lector of the port wherever he might be located, by which a fund was established for the payment of those who did this extra or night work. That system was subject to abuse and in some instances, it is said, it was abused. It was finally abolished by an order of the Treasury Department. As the conditions are today, therefore, when a vessel arrives in a given port and the captain is anxious to make haste and to go about his business, provision can be made only for the payment of the customs inspectors; the storekeepers, watchmen, weighers, and others engaged in the work between sunset and sunrise, night hours, are left without any compensation whatever. In my own port, that of Philadelphia, the assistant weighers recently worked one hundred and fifty nights without any compensation at all. The inspectors were paid, but the rest of the men were not paid. One of the existing enactments provides that in order that shipping may be facilitated the captain of a vessel may report to the customs officer and obtain his leave to discharge the cargo at once. This is due to the fact that bonds are entered by certain existing lines that have been in existence a year or more.

* * * * *

So far as the payment of those not inspectors is concerned, I think the mind of the committee should be disabused of the fact that the Government would be financially affected by the passage of this proposed law. The owner of the vessel pays for this extra work. He is perfectly willing to pay for the extra work. Not a cent comes out of the Treasury, and you would not be legislating

at all with regard to the finances of the Government. The owner of a vessel comes in and wants to get away, and he asks the privilege of unlading at night between sunset and sunrise, the hours proscribed under the law. He offers a bond and is perfectly willing to pay the inspectors for whom compensation is provided at the discretion of the Secretary of the Treasury, but he can not pay, except in an indirect way, the weighers, the storekeepers, and the watchmen.

The provisions of this bill contemplate the entry of a bond that will enable the owner or agent of a vessel to provide through the collector of the port, at the instance and by the direction of the Secretary of the Treasury, a fund from which these employees of the Government may be paid. They ought to be paid for their extra time. They serve the Government and receive compensation for the service they render, but they are not altogether serving the Government when they do this work in the night hours; they are serving very largely the owner or the agent of the vessel, who is perfectly willing to pay for the services. Now, it does seem to be a very unfair proposition that the law should specially favor the inspectors of customs with regard to this night work, and should expressly forbid payment to the assistant weighers, storekeepers, watchmen, and others who are necessarily employed upon the work.

* * * * *

Mr. HULL. This bill does not provide that all the persons shall be paid by the owners of the vessels; only certain persons, and the others by the Government?

Mr. MOORE. It makes no provision whatever for any payment by the Government.

Mr. HILL. It says on page 5:

> Customs officers acting as boarding officers, and any customs officer who may be designated for that purpose by the collector of customs, are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for night services.

Is that included under the previous provision? It does not seem to be.

Mr. MOORE. That is clearly to come out of the fund which is set aside by the owner or agent of the vessel for the payment of this night service.

Mr. HILL. It does not say so.

Mr. MOORE. If it does not say so, I am perfectly willing that it should be made clear.

* * * * * *

463–465 Mr. DALZELL. On page 4 the bill provides that "The Secretary of the Treasury shall fix a reasonable rate of extra compensation for night services of inspectors, storekeepers, weighers, and other customs officers and employees," etc., and then it goes on to provide that the extra compensation shall be paid by the vessel owners, but at the end of the paragraph it reads:

> Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation.

Now, that is clearly extra compensation to be paid by the Government, and not by the vessel owner.

Mr. MOORE. If you think so, I am perfectly willing that it should be made clear.

Mr. DALZELL. Do you not think it is, from the language I have read?

Mr. MOORE. It may be susceptible of that interpretation. I have not looked at it in that way, because the whole purpose of the bill was to put the expense upon those for whose convenience we propose to pass it. One line would simplify that. Is not that your understanding, Mr. Bennet?

Mr. BENNET. Yes, sir. It seems to me that language is simply surplusage.

* * * * *

Mr. MOORE. I want to say that my understanding of this bill and of that provision is that in order to facilitate commerce and to give convenience to the shippers, we have proposed to accommodate them merely in the matter of this night service at their own expense, and we propose that the expense, whatever it may be, shall not be distributed at their option where it might be subject to abuse, but that it shall be entirely fixed and regulated by the Secretary of the Treasury, and shall be administered or distributed through the collector of the port at the direction of the Secretary. The only purpose is, as I understand it, to enable a man who wants something done for himself, the owner or agent of a vessel, to say, "I would like the privilege of unlading at night; I would like to use the twelve hours I am now prevented from using; I would like the op-

portunity of getting away, and I am perfectly willing to pay, through the proper officers, whatever the extra cost may be"; and my purpose, as the proponent of this bill, is to have that fund so created distributed at the instance of the Secretary of the Treasury through the collector of the port, because if in one place one collector has discretion which is at variance with the discretion of another collector, or if at one port one shipowner is willing to pay more in his haste than another shipowner, or if we give an option to the men who provide the fund as to how it shall be distributed, then there would be a great deal of difficulty in the ports and there would undoubtedly be abuse, because one man would pay more than another man. If you put them under the Secretary of the Treasury and systematize the business you have a check upon every dollar received and expended and you have a uniform system of payment which it seems to me is extremely desirable and would tend to avoid abuse.

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466 Mr. MOORE. Suppose a man for day work gets $3.50, for night work under this provision he would get $7.

The CHAIRMAN. That is what you intend?

Mr. MOORE. Yes, sir; that is my understanding.

Mr. GAINES. Not to exceed $7.

Mr. MOORE. The Secretary of the Treasury might fix it at a less rate.

The CHAIRMAN. I think the committee can fix that.

Mr. MOORE. That is our understanding. I do not want you to think that we are trying to get three times the day pay for extra work at night.

The CHAIRMAN. I did not understand anything of the kind.

Mr. MOORE. A man who is on duty all day and who has to work all night ought to have extra compensation for the extra night work. It is excessive and extra, and he is perhaps entitled to more compensation. As modern conditions go——

The CHAIRMAN. I understand that is the usual compensation demanded by labor unions throughout the country?

* * * * * *

2. *Hearings before a Subcommittee of the Committee on Ways and Means, House of Representatives (66th Cong., 1st sess.), on H. R. 6577, the companion bill to S. 3418, which became the Act of February 7, 1920, amending Section 5 of the 1911 Act (c. 61, 41 Stat. 402)*

STATEMENT OF MR. WILLIAM H. BOND

3 Mr. BOND. I reside in Boston, and I represent the inspectors of customs and their various associations all over the country.

Mr. TREADWAY. You represent them by official selection by them?

Mr. BOND. It amounts to that virtually. Our national organization has not had a meeting for a long time, and the inspectors for the Atlantic coast have done most of this business, so that the inspectors at New York, Boston, Philadelphia, and Baltimore are the most concerned in selecting me. I am somewhat known to the inspectors in the West, and they are aware that I am in this work, and have given their consent.

Mr. TREADWAY. So far as your organization in the East is concerned you have been designated by them?

Mr. BOND. I have been delegated to do this.

* * * * * *

5-6 Mr. TREADWAY. This may start us right. This calls for the hours of labor to be from 8 o'clock a. m., to 5 o'clock p. m.—8 hours. What were the hours specified in the act of February 13, 1911?

Mr. BOND. In the act itself, I think the hours are specified as from sunrise to sunset. That was the original law, I think, in 1789, the basic law of the customs.

Mr. TREADWAY. That is the time of docking boats, isn't it, practically?

Mr. BOND. This law—let me explain that please. This law of 1789, I think that is the date—is the basic law, so-called, of the customs. This was the practice at that time, to work from sunrise to sunset. Inspectors at that time were employed temporarily. They were paid $1.25 a day. Whenever an inspector was needed he was sent for and worked as long as needed and went home to his farm or whatever he had to do, and when needed again he came back. That was the condition of things under that law. Every time the law has been reenacted, or that particular phase of it has been reenacted in other laws, that seems to be carried right along down. Even the report of the Tariff Commission, which is now before Congress, carries that same thing right along. That has been interpreted by the department to mean from 7 a. m., to 6 p. m., because, of course, from sun-

rise to sunset is not a reasonable and workable provision. In the summertime it would be from 3:30 in the morning until 8:30 at night, and in the winter from 7:00 or 7:30 to half past 3 or quarter to 4.

Mr. TREADWAY. That gives you an 11-hour day without extra compensation?

Mr. BOND. Yes; and I want to say right here, it is an 11-hour day. For many years I have eaten my lunch with a sandwich in one hand at my desk and a pen or pencil in the other hand. We can have the opportunity of going aboard a ship, when we have a ship at the dock for lunch, but it happens very, very often that I can not get away to lunch.

* * * * * *

Mr. TREADWAY. The idea is, you are first endeavoring to change the present provision from 11 hours to 9, or endeavoring to provide eight hours of work, to follow an eight-hour day, and that you should get extra compensation for overtime?

Mr. BOND. Yes; I want to say here that our hours of labor from the time when this was originally started under the old law through succeeding laws our hours were made to correspond with the hours during which it was customary to work unloading boats. That is to say the law does not say that the inspector's hours are such and such. It says that the hours for discharging vessels shall be between sunrise and sunset, and as construed by the department that means from 7 to 6, and yet the hours for discharging ships, the hours during which longshoremen were paid a day's pay, just as

in the case of steamship and railroad employees, who also worked from 7 to 6 during the last year, those hours have been changed so that now—and I want to say that this is very largely by Government direction—as you know the hours of steamship employment and the hours of railroad employment are eight hours, from 8 to 5.

* * * * * *

Mr. TREADWAY. Let me get down to your pay for services. You get $5 a day, which would mean something like $1,600.

Mr. BOND. $1,825, 365 days. We are paid a regular annual salary for every day in the year. I would say in regard to that per diem salary that it is a relic of the method of paying of 120 years ago, when inspectors were only occasionally employed. Now, they are constantly employed, but it has not been changed. We are trying to get a salary bill through Congress.

* * * * * *

Mr. BOND. * * * For an inspector, there is no hour of the 24 hours that is his own. We never know when we are to be called upon. Some years ago I became affiliated with an organization which required my presence for three months on the second Wednesday of each month. I was required to be there. They could not do very well without me if they were going to do what they had proposed. On each of those three occasions a passenger ship was docked at 5:30 in the afternoon and I was detailed to examine the baggage. I can not buy a ticket to a theater with any certainty that I can go.

One year I was detailed to work on the Hamburg-American Line. I thought it would be an advantage to learn to speak German. German was in better favor than now. During three months I was able to attend only two sessions of the school and had to give it up.

We never can tell until 4 o'clock or half past 4 in the afternoon whether our services are going to be required after hours. My wife never knows when I am coming until I telephone that I am about to start. So that the condition in regard to us is rather unfavorable.

Mr. TREADWAY. What is the attitude of the department toward this legislation?

Mr. BOND. Mr. Fordney has a letter, a copy of which was sent me. I have it right here.

Mr. TREADWAY. I think you had better give it to the stenographer.

(The letter follows.)

TREASURY DEPARTMENT,
Washington, September 25, 1919.

Hon. J. W. FORDNEY,
Chairman Committee on Ways and Means, House of Representatives.

MY DEAR CONGRESSMAN: I have your letter of the 18th ultimo inclosing for recommendation a copy of H. R. 6577, which is a bill amending the act of February 13, 1911, relative to the lading and unlading of vessels at night, the preliminary entry of vessels, and for other purposes.

The bill amends section 5 of the act of February 13, 1911, so as to permit the payment of extra compensation to customs officers or other employees of the customs who may perform services in connection

with the lading or unlading of cargo of vessels or other conveyances, the receiving or delivery of cargo on or from the wharf or bonded warehouse, or the lading of cargo or merchandise for transportation with the benefit of drawback, or for the examination of baggage of passengers.

Under the provisions of the act of February 13, 1911, as construed by the Attorney General in an opinion rendered under date of March 3, 1913 (T. D. 33275), baggage is not cargo, and the department is therefore precluded from granting extra compensation to customs inspectors who are engaged in the examination of baggage. These inspectors are frequently required, during the season when ocean travel is heavy, to work on Sundays and holidays and at night. In many instances they are required to work until a late hour in the night after having worked all day, and for this overtime they receive no compensation.

I will be very glad to be able to have inspectors who examine passengers' baggage placed in the same class as the other inspectors, so far as the payment of extra compensation is concerned. * * *.

The department has under consideration a plan whereby boarding officers and inspectors of customs will be assigned to duty in eight-hour shifts and will not, therefore, be called upon to work overtime and no extra compensation paid to officers assigned to the night shift. In order to carry out such plan it will be necessary to secure additional appropriations, and, pending the adoption of the plan it will, of course, be necessary to detail inspectors and other employees for night work.

I am of the opinion that when overtime work is required extra compensation should be paid as outlined in the bill now under consideration. I therefore recommend the enactment of this bill into law.

Very truly, yours,

L. S. ROWE,
Assistant Secretary.

* * * * *

13 Mr. CRISP. * * * How many Government employees engaged in inspecting work will be affected by this bill if it passes?

Mr. BOND. It will be pretty difficult for me to tell. This bill, at the bottom of the page and at the top of the second page, prescribes the kind of work which is to be performed. You understand the Government pays no overtime. This is overtime which is paid by the steamship companies. Now, there are inspectors of customs at various places, such as the Texas border and the Canadian border, who work long hours, and they do not collect from anybody else. It is entirely for the Government. The Government pays no overtime. There is no way that we can protect them in a bill of this nature.

* * * * *

18–19 Mr. TILSON. If you finish at 5 then you have no money coming under the proposed bill; only your day's pay.

Mr. BOND. And do not work any overtime?

Mr. TILSON. Yes.

Mr. BOND. Surely.

Mr. TILSON. I agree with you that you should be paid well for overtime.

Mr. BOND. I claim when we do work overtime—mind you it is for the accommodation of other people—we should be paid for it.

* * * * * *

3. Congressional debates on the bill which became the Act of February 7, 1920, amending Section 3 of the 1911 Act

59th Cong. Rec.

IN THE SENATE

640 Mr. KING. Mr. President, is this the bill to which the Senator alluded a few days ago, and stated, either upon the floor of the Senate or to a number of Senators who approached him in connection with it, that it involved no expense whatever upon the part of the Government?

Mr. CALDER. No expense whatever.

Mr. KING. It merely permits the owners of vessels and the consignees and employees upon the vessels, or the longshoremen, to make such contracts as they please respecting the unloading of the vessels at night?

Mr. CALDER. Yes; and it permits customs officers to work at night and to be paid by the shipowner, with the consent of the collectors of customs in the respective districts. No expense whatever is incurred upon the Government.

Mr. KING. Mr. President, I would like to ask the Senator two questions: First, what reason is there for the Government to fix the terms of special contracts that shall be entered into between the owners of vessels and the employees of the Government for the purpose of securing the un-

loading of vessels on Sundays or holidays? In other words, why should the Government intervene and prescribe the contractual relations that shall exist between the parties? That is one question.

Secondly, if this bill should pass and there should be any considerable amount of overtime work done under the bill, would it not interfere with the efficiency of the employees of the Government in the performance of their duties to the Government? I can readily conceive that if there is very much Sunday work or night work the employees working for the Government and being called upon to perform this additional service would not be in condition to render efficient service to the Government. It might very materially impair their serviceability to the Government and interfere with the proper performance of their duties to the Government.

Mr. CALDER. Mr. President, this bill was prepared by the Treasury Department. We have had a law on the statute books for a number of years permitting the lading and unlading of vessels at night, for which the Government employees were paid in some such manner as is prescribed in this measure. But a year or two ago the Attorney General held that men could not be paid for passing upon the baggage taken off ships at night, but could be paid for supervising the discharging of the cargoes. That caused some difficulty, because we found a customs official examining baggage at night and being unpaid for it, and right alongside of him a customs official examining cargo and being paid for that.

These men do not work very much at night. I venture the statement that they do not average more than a day a week at the most, perhaps four or five days a month. If the Government did not have some control over it, and the shipowner were compelled to bargain with the customs inspectors and other Government employees all sorts of compensation might be demanded. This bill permits the Government to collect from the shipowners not in excess of double pay for overtime. The collector of customs fixes the pay for overtime, but cannot allow more than double time for nights and Sundays. If I own a vessel and wish to have it discharged at night, it would be necessary for me to obtain a permit from the collector of customs to supervise the job. He would assign regular customs employees and keep track of their time, and the shipowner would pay the collector for it, and then, in turn, the men would be paid by the Government. The scheme is one that has been carefully considered, I will say to the Senator from Utah [Mr. King], and meets with the approval of the Treasury Department and the Shipping Board as well; it is also satisfactory to the men who work in the Customs Service.

The bill was reported to the Senate without amendment, ordered to be engrossed for a third reading, read the third time, and passed.

IN THE HOUSE

* * * * *

2171 Mr. BEE. I wanted to ask if there was enough of this to justify the employment of

additional men, instead of the employment of these men overtime?

Mr. TREADWAY. I should judge that there are ample men for the service, for if additional men were employed there would be the rush hours just the same. If two boats, for instance, are being unloaded at one of our minor ports at the same time, it can be seen that the need for overtime work will be just as likely to occur as though there were additional men for a few particular hours; so that it is better not to raise the number of employees, but pay a living wage to the men who for many years have given faithful service in this line of work.

Mr. BEE. Under existing law, they are not permitted to work over eight hours, as I understand it. That is, an eight-hour day is fixed?

Mr. TREADWAY. No, sir. That is what we are endeavoring to change in this act. The present law provides for a 10-hour day, and here we fix it at 8 hours, with a provision for overtime beyond that.

Mr. BEE. So as to conform to the standard fixed elsewhere in the country?

* * * * * *

Mr. DUPRE. Mr. Chairman, I intend to offer the following amendment, and I might as well discuss it now. I will ask the Clerk to read the amendment.

The Clerk read as follows:

> Amendment offered by Mr. Dupre: Page 3, line 10, strike out the quotation marks, insert a colon and the following:
>
> "*Provided further*, That in those ports where customary working hours are other

than those hereinabove mentioned the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Mr. DUPRE. Mr. Chairman, as those who have caught the purport of the amendment will discover, no hostility to the bill is intended by it. On the contrary, I am heartily in favor of the measure, both in its fixing an eight-hour day and in its overtime provisions. The amendment is offered simply to meet the situation that exists in my home city of New Orleans and possibly in other ports of the country. The bill as drawn provides for overtime pay between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian, proceeding on the theory that working hours begin in all ports at 8 o'clock in the morning and end at 5, with an hour for lunch. It happens that in the city of New Orleans conditions are different, as was set forth in a telegram received by me from the agent of the New Orleans Steamship Association. * * *.

Mr. DUPRE. In accordance with that request and in accordance with the condition that exists in New Orleans, I have offered the amendment, which is entirely permissive. It leaves with the collector of customs the authority to regulate the hours of customs employees so as to agree with the prevailing working hours in those ports; but I have safeguarded the eight-hour day which this bill provides for, and I have safeguarded the provision for overtime by adding the words—

But nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

I have submitted that amendment to the two majority members of the subcommittee of the Ways and Means Committee who considered the bill, the gentleman from Massachusetts, [Mr. Treadway], and the gentleman from Connecticut [Mr. Tilson], and they think the amendment is entirely unobjectionable, saying that the conditions referred to had not been drawn to the attention of the committee.

Gentlemen here will realize what would happen if longshoremen, who have a way of their own about many things, decided to go to work at 7 o'clock and work until 4, and under the law the customhouse employees, who should work concomitantly with the longshoremen, could not get any overtime pay until between the hours of 5 p. m. and 8 the next morning. There would be a hiatus between 4 o'clock when the longshoremen stopped work and 5 o'clock when the customhouse employees would begin to get their overtime, and naturally the latter would not want to work in the interim. The result would be very unfortunate, and this merely allows the collector of customs to say that those two bodies of men, both of whom are essential to unloading and loading the ship, may be allowed to work at the same time. It is not mandatory in any way, but merely discretionary with the collector. A similar telegram has been received by my colleague Mr. O'Connor, of Louisiana, who is here in the Chamber, and who shares

with me the views expressed by me both as to this bill and to the amendment proposed.

* * * * *

2175 Mr. BRIGGS. * * * The measure provides, however, that this cost does not fall upon the Government but falls upon the owner, agent, master, or consignee of such vessel or conveyance who wants the services of these inspectors, weighers, and other employees to discharge their vessels at a time when these men ordinarily would not be required to perform that duty. If those gentlemen want that convenience and that service and are willing to pay for it, I do not see why Congress should hesitate to grant that privilege to these men who are as faithful a body as any that the Government employs. And this recognition of the eight-hour day in this Government service, and which obtains in other branches of the service, is such also as is due them, and I am glad to see recognition accorded them by the committee which reported this bill and by the Senate that passed it, and I hope it will be passed by this committee and the House.

* * * * *

2176 Mr. TILSON. Mr. Chairman, when this bill was first presented to the subcommittee of which I was a member I confess it gave me something of a shock. When I read the bill and saw that it gave a day's overtime for any time beyond the prescribed day, it somewhat disturbed me. For instance, it provided in the original bill that after the first eight hours any services rendered, even one minute, should entitle the inspector to an extra full day's pay. The bill as passed by

the Senate was somewhat different, and this in turn has been somewhat changed by our committee, until it is now in its present shape. Upon a first reading even yet it would seem that we are rather liberal with other people's money. You will note that for a little overtime we allow an additional day's pay, and for a little more overtime still another day, so that within the compass of one 24-hour period an inspector can make three and one-half days' pay. A somewhat closer examination, however, will reveal this fact, that these men are paid a very low salary—$4, $5, or $6 per day—and that the hours which they have to work are not at all such as the average man would arrange for himself as an ideal schedule.

* * * * *

Mr. PARRISH. I would like to know, for the benefit of the Record and myself, personally, how much they get per day?

Mr. TILSON. They get $4, $5, or $6 as their basic salary. There are three different grades. If they work only a day, without overtime, that is what they get. The old schedule, under which they now work, is a 10-hour day, beginning at 7 o'clock in the morning and running until 6 o'clock at night, with one hour off for luncheon. The rule provides that after 6 o'clock any time over entitles them to an extra day. They gain something on this arrangement, because they often have to work overtime, and so they undoubtedly gain many overtime days in that way.

What this bill seeks to do is to enact into law what has been a Treasury regulation, with this

change, that instead of a 10-hour day it makes an eight-hour day, which the subcommittee thought proper. Instead of providing that for any time after an eight-hour day the inspector shall receive an extra day's compensation, we provide in the bill that for any time beyond two hours or a major fraction of two hours—that is, for any time beyond an hour—he shall receive an additional half-day's pay. Even this would seem liberal were it not for the very low salary and the very bad hours which these men have to work. It seemed to the subcommittee that, taking the regulations which have prevailed for many years, and taking the very low compensation which these men receive per day, the schedule as fixed in this bill is not more than fair for them.

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2177 The CHAIRMAN. The question is on agreeing to the amendment to the amendment.

The amendment to the amendment was agreed to.

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Mr. LONGWORTH. I reserve a point of order against the amendment for the purpose of hearing an explanation of it.

* * * * *

Mr. DUPRE. * * * This amendment has the approval of the two gentlemen on the subcommittee of the Committee on Ways and Means, the gentleman from Massachusetts [Mr. Treadway] and the gentleman from Connecticut [Mr. Tilson], who have considered this measure. The bill in question, in providing for overtime pay, fixes the same between 5 o'clock p. m. and 8

o'clock a. m. It happens that in the city of New Orleans the working hours of the longshoremen are from 7 a. m. to 4 p. m., and in order that there shall be no conflict between this bill and the working hours of the laboring men of that city, and possibly in other ports, this proviso simply authorizes the collector of customs to adjust the hours of the customhouse employees with those of the prevailing working hours in that city. In other words, if the men begin their work at 7 o'clock and work until 4, the collector of customs can provide that the overtime shall be from 4 p. m. until 7 in the next morning instead of from 5 p. m. until 8 o'clock the next morning. It is entirely permissive. If the collector of customs sees any reason why it should not be done, it is within his authority not to do it, and I have safeguarded absolutely any possibility of lengthening the working day to more than the eight hours provided by the bill or of interfering with the overtime charge in any way.

2178 Mr. TREADWAY. As I understand it, it is simply to conform the hours in the lading and unlading of vessels and the customhouse hours at that port.

Mr. DUPRE. Entirely; and at other ports, for aught I know. * * *

The amendment was agreed to. * * *

Mr. SAUNDERS of Virginia. I am speaking of what is in the bill under consideration. "The extra compensation" is "to be paid by the master, owner, agent, or consignee of such vessel." To whom? You have to look a long ways further on to ascertain to whom it shall be paid. The bill reads that "whenever such special license or

permit for immediate lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs," and so forth. But nothing is intended to be granted to the collector.

I suggest, and I think the change of phrasing will make a much better sentence, that the language of the bill should be recast so as to read as follows: "Whenever such special license or permit for immediate lading or unlading, or for lading or unlading at night, or on Sundays, or holidays, shall be granted, the master, owner, agent or consignee of such vessel shall pay said extra compensation to the collector of customs, who shall pay," and so on.

Mr. TREADWAY. I think the gentleman's language is clearer, but the bill as prepared follows the identical language now in the law.

Mr. SAUNDERS of Virginia. This is very involved language, even if it is the language of the original law.

4. *Hearings before the Committees on Commerce, United States Senate (67th Cong., 1st and 2d sess.), on S. 1504, S. 1774 and S. 2188. S. 1504 provided for the extension to immigration inspectors of the overtime pay benefits that were in effect as to customs inspectors; S. 1774 provided that the Government and not the carrier should pay extra compensation for overtime customs services rendered for ships operating on regular runs of not more than 200 miles in length; and S. 2188 undertook to exempt railroads, bridges, and ferries from the payment of overtime under the 1911 Act as amended*

15 STATEMENT OF MR. W. H. BOND, BOSTON, MASS., PRESIDENT NATIONAL ASSOCIATION OF CUSTOMS INSPECTORS

* * * * *

Mr. BOND. Mr. Chairman and gentlemen of the committee, when this bill, S. 1774, was introduced in the last session, the number then being, I think, 4888, the chairman of this committee brought it to my attention and asked if this Association of Customs Inspectors of the United States had any objection to the passage of the bill. We registered our objections, and those objections are on file with this committee. I have had considerable correspondence with Senator Jones, chairman of the committee, both in relation to that bill and to the same bill now pending before the committee under S. 1774. Our objections are set in detail in that correspondence.

* * * * *

16 Mr. BOND. * * * In the first place, I will take Mr. Allen's testimony, where he speaks of inspectors being paid for overtime from the close of the day to the close of their overtime employment, whether they are constantly at work between those times or not. And this, gentlemen, is not new. The law of 1911 covered that procedure exactly. The only difference between the law of 1920 and the law of 1911 is that the 1920 law shortened the day in accordance with modern practice from 10 to 8 hours, and made the

17 law apply also to the inspection of passengers' baggage. You understand that we have always received overtime pay, which was paid by the transportation companies for work on lading and unlading of cargo, and the rate of

pay prescribed by the department was one day's pay for any time up to 11 p. m. and two days' pay for any time after 11 p. m. That was like our original proposal when our law of 1920 was introduced, but because of objection of members of this committee the language of the bill was changed to its present form. So that the "waiting time," or the intervals after the close of the day until overtime work is completed, has always been paid for, the only difference now being that it applies to work on baggage and, consequently, the expense to the steamship companies is somewhat greater. * * *

18 The law now in effect provides for payment of inspectors when they work overtime in the examination of passengers' baggage, which is done for the accommodation of steamship companies, just the same as cargo work. That was the point emphasized before this committee before the passage of the bill—on night work or Sunday work, with two men employed, one working on cargo and the other on baggage, both are entitled to overtime pay. That was so manifestly fair that Congress agreed to it.

* * * * *

22 Mr. BOND. * * * Mr. Allen also spoke of the money being paid by the Government for overtime service, as is provided for by this bill, S. 1774. And you have a letter from the department which tells you why that should not be done. That letter is on file with this committee. There is no reason, where the accommodation is extended to the steamship companies, why the Government should stand the expense.

The Government pays for the service during the ordinary hours of business. When the arrival of ships occurs after the regular hours and the accommodation is for the benefit of the steamship companies, they should bear this expense for overtime inspections the same as they bear their other ordinary expenses. Mr. Allen represents steamship companies, and he says that a half day's pay for two hours' overtime service is perfectly fair, so you can see that they do not consider it an overcharge. They do not claim that the rate is too high, but they only want to pay for the actual service performed.

* * * * *

26 Mr. BOND. * * *. Mr. Bronson also says in his testimony, in complaining about paying for overtime:

> A man who does night service can spend his days wherever he pleases. He stays at home until half past 8 or whatever time is necessary for him to get his car and come down there.

We say that that man is not free, even if he is at home getting his supper or anywhere else.

Those three men have been hard at work all day, since 8 a. m.; then one of them is off duty constantly from 5 o'clock on, while the other two have just about time to run out home, clean up, and get their suppers, and they are back on the job again not later than 8:30, and none of the three leave until the work on the night boat is completed. His insinuation that these inspectors are doing nothing during the day is just as untrue as his other testimony.

Senator NELSON. Let me ask you a question. Is not the man that does night duty immune from day duty?

Mr. BOND. Not at all. I am at work at my dock from 8 o'clock in the morning until 5 o'clock in the evening. Then I may continue on my own ship or perhaps it may be necessary to change to another ship, and I may work all night, as many times I have done, and then report back to my dock and continue working there.

Senator NELSON. But what about the next day?

Mr. BOND. The next day I continue at my work just exactly the same.

Senator FERNALD. Is there but one crew?

Mr. BOND. Just one crew. There are some places on the border where it is practicable to have three 8-hour shifts for railroad work, but there is no other place where that is practicable. * * *

That deals with a place where train service is not continuous at night. At other places, like Buffalo, where trains are in operation at all hours of the 24, the Government maintains three 8-hour shifts of inspectors, and no bills are rendered against the railroad companies except for Sundays and holidays. These bills, I may say, are not being paid, as the railroads are stalling in the hope that something may happen either in Congress or in the courts which will relieve them. In the meantime the inspectors are continuing to render the overtime service and looking around for somebody in authority who has interest enough in them to defend them. Across the river from Buffalo the Canadian customs officers, working 12 hours a day, are re-

ceiving from these same railroads 4 hours' overtime every day besides overtime for Sundays and holidays.

* * * * *

Mr. BOND. As I have already said, at points where railroad train passage is constant during the 24 hours we maintain a 24-hour service in three 8-hour shifts, and no bills are rendered for week-day service against the transportation companies. At these points in Minnesota, according to what you say, Senator, the only overtime is for about two hours in the evening.

Senator NELSON. Let me ask you, where they have three crews, do they get extra time for night work?

Mr. BOND. No, sir; the only bills they render in such case are for the seventh day.

Senator NELSON. And for Sundays, too?

Mr. BOND. For Sundays; yes. That is what I mean when I say that. They render a bill against the railroad company for the seventh day.

Senator NELSON. For double pay?

Mr. BOND. Yes. In some of those places it is not necessary to have three 8-hour shifts, because, as you say, the train arrives early in the evening, and then there is no more business, and it would be foolish for the Government to expend money to maintain three shifts.

Across the river from the port of Buffalo there is a Canadian port, and railroads cross from Canada into this country and from this country into Canada at that point. Our men are retained there in three 8-hour shifts and they have no overtime on week days, but they do render bills

for Sundays and holidays, for which any man would be entitled to extra compensation.

* * * * *

38–39 OFFICE OF THE SECRETARY,
TREASURY DEPARTMENT,
Washington, Feb. 2, 1921.

The Chairman of the Committee on Commerce,
United States Senate.

SIR: I desire to acknowledge your letter of the 24th of January, requesting that I furnish the committee on Commerce with such suggestions as I may deem proper touching the merits of S. 4888, a bill to amend further section 5 of the act of February 13, 1911.

* * * * *

S. 4888, if enacted into law, would require the Government, rather than the steamship companies requesting the services, to pay, at the rates prescribed in the act of February 7, 1920, for the performance of any of the overtime services mentioned therein, in all cases of steamship companies operating on regular runs between ports in this country and ports in a foreign country not more than 200 miles in length. The classification would include ships running between the United States and British Columbia, the United States and Canada, the United States and Cuba, and the United States and the Bahama Islands.

Permit me to state that I think the Government should not be required to pay extra compensation for overtime service, as provided in S. 4888, which is performed entirely for the convenience of the steamship companies and their patrons. Moreover, the passage of such a bill would establish a

discrimination in favor of a specified class of steamship companies.

* * * * * * *

Respectfully.

D. F. HOUSTON, *Secretary.*

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TREASURY DEPARTMENT,
61 UNITED STATES CUSTOMS SERVICE,
Buffalo, N. Y., October 22, 1921.

MR. ERNEST FRITSCHI,
United States Customs Inspector,
North Buffalo, N. Y.

SIR: * * *

I have a very strong conviction that every employee in the customs service is entitled to one day's rest in seven, and should not be required to work every day in the year aside from two weeks' annual leave, as the majority of the customs employees in this district have to do. * * *

I believe it more desirable that every employee should have one day's rest in seven, but as long as the men are required to work seven days a week I believe that they are entitled to the overtime pay for Sunday and holiday work, and that the act should be made broad enough to include all customs employees who are required to work on Sundays and holidays. * * *

Respectfully,

GEO. G. DAVIDSON,
Collector of Customs.

62 * * * * * * *

H. W. SMITH,
Special Deputy Collector.

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STATEMENT OF MR. G. F. SNYDER, REPRESENTING WABASH RAILWAY CO.; MINNEAPOLIS, ST. PAUL & SAULT STE MARIE RAILWAY CO.; AND SPOKANE INTERNATIONAL RAILWAY CO.

87 Senator RANSDELL. You say there is a 24-hour service at Detroit?

Mr. SNYDER. Yes.

Senator RANSDELL. How long has that been in existence?

Mr. SNYDER. A good many years; but not for Sundays and holidays.

Senator RANSDELL. How is that service regulated out there?

88 Mr. SNYDER. They are still billing the carriers for this service on Sundays and holidays.

Senator RANSDELL. Do they require them to pay overtime, or is the time divided into eight-hour shifts and they get paid for their regular eight-hour shifts?

Mr. SNYDER. They get double time for Sundays and holidays. And the only reason the railroads are not paying that money today is because of the injunction they secured and the litigation now pending in the courts. If the railroads are not successful in that litigation then they will have to pay all these bills that have been rendered.

Senator RANSDELL. Is that the only place in this country where that custom prevails?

Mr. SNYDER. The only place that I know of.

* * * * *

89 Mr. SNYDER. And we say we have no objection to the men receiving overtime, we simply object to paying it ourselves, and it is for the customs division to say how that service

may be best regulated. If a man works overtime after his 8-hour shift he should receive overtime for that work, the same as is done with railroad employees. The railroad employees are going to be very much dissatisfied if they see these customs men come down to meet a train at midnight and perhaps get two days' pay for overtime to meet that train.

STATEMENT OF MR. A. L. JAMES, ASSISTANT GENERAL SOLICITOR, GREAT NORTHERN RAILWAY CO.

95 Senator RANSDELL. * * * These men are entitled to overtime, and somebody must pay them. Do you think it would be better to have this service on a 24-hour basis, as suggested by Mr. Snyder? As a practical proposition, what would you as a citizen and taxpayer suggest to us as the lawmakers?

Mr. JAMES. These men should, of course, receive reasonable pay for their work. Now, then, it occurs to me that it is simply a question of whether it would be cheaper to pay these men overtime for the work they do on these trains, which takes only a few minutes, or whether it would be cheaper to put in a 24-hour service. Now, considering the situation at most of these stations along the Great Northern, I think it would be cheaper to pay the men overtime than to put in a 24-hour service, because there are only three or four or five trains a day at most of those places; two passenger trains a day and three freight trains a week, or four freight trains a week. It is simply a proposition of which method would be the cheaper for the Government

and give these men a fair compensation for their work.

STATEMENT OF MR. J. H. FISHBACK, WASHINGTON REPRESENTATIVE OF THE GRAND TRUNK SYSTEM

96 Mr. FISHBACK. * * * Some months ago I was called up by an official of the system, and it was pointed out that by reason of insufficient immigration inspections passenger trains were delayed. On taking the matter up with the Immigration Bureau here they stated that they had wherever possible supplied a 24-hour service, but that on account of lack of appropriations it was impossible for them adequately to take care of the very extensive duties of the Immigration Service, indicating that the Government itself through the Immigration Bureau of the Department of Labor recognize that a 24-hour service ought to be performed and paid for by the Government. If I may be permitted, I would like to urge as strongly as possible that it does not seem reasonable that the railroads should be called upon to pay this overtime charge for service rendered by Government employees simply because the Government has not provided appropriations to take care of it.

* * * * * *

98–99 WASHINGTON, D. C.,
February 20, 1922.

Hon. JOSEPH E. RANSDELL,
Committee on Commerce, United States Senate,
Washington, D. C.

DEAR SENATOR RANSDELL: Referring again to the hearing held before the subcommittee of the

Committee on Commerce; January 19, on Senate bills 1504 and 2188, with regard to overtime inspection by immigration and customs inspectors, and to the request made during the course of the statement I submitted to your subcommittee that I furnish the committee with information as to the points on the international border where the Government has provided 24-hour inspection service:

I have today received from the Division of Customs, Treasury Department, the attached letter signed by Mr. J. D. Nevins, assistant chief of that division, and inclosing a list of the ports at which 24-hour customs inspection service is furnished, and which 24-hour service—as explained in note accompanying the list—is divided into three shifts of 8 hours each. It will be observed that there are numerous points where the Government has provided 24-hour customs inspection service. This confirms the general statement that I made to the committee that such 24-hour service had been provided by the Government, and that inasmuch as this had been recognized as a duty of the Government at certain points, it was hardly just or logical to insist that at points where the departments have been unable because of lack of sufficient funds or otherwise to provide 24-hour inspection of shifts that railroads should be required by law to pay for overtime in such cases. Senate bill 1504 provides that overtime inspection and inspection on Sundays and holidays shall be paid by the railroads as new legislation, and Senate bill 2188 is to plainly provide that in the customs inspection service railroads shall be relieved of the payment for overtime customs in-

spection and customs inspection on Sundays and holidays.

The act of 1920, Senate bill 3418, has been construed by the Treasury Department as requiring the payment by the railroads for overtime inspection and inspection on Sundays and holidays; that is, in cases where the department has not provided itself for 24-hour inspection. Senate bill 2188 would amend the existing law so as to clearly provide that this inspection, which is made in the interest of the protection of the revenues of the United States, shall not be charged against the railroad companies.

* * * * *

Yours very truly,

J. H. FISHBACK.

STATEMENT OF MR. RAY M. STANLEY, ATTORNEY FOR DETROIT & WINDSOR FERRY CO., PORT HURON & SARNIA FERRY CO., WALKERVILLE FERRY CO., AND NIAGARA FERRY & TRANSPORTATION CO.

* * * * *

100 Mr. STANLEY. Yes, sir. Take Buffalo, for instance. The first man comes on at 6 o'clock in the morning. He works eight hours. Number 2 man comes on at 12 o'clock and laps him a couple of hours, so that during the big hours of the day two men are on duty in the customs department; and the last man comes on at 5 o'clock in the afternoon—or 4 o'clock, whichever it is—and that gives him his 8-hour shift by 12 o'clock. There are assigned to that particular station three men. There is, as I say, never any overtime service, viewed from that angle.

Mr. BOND. There is no charge made for any of this service nor is there any overtime service.

There is no overtime service charged against the Port Huron & Sarnia Ferry Co. in week days; that is true, isn't it?

Mr. STANLEY. That is true. I will take up Sundays and holidays a little later.

* * * * *

102 Mr. STANLEY. * * * I note in Mr. Bond's testimony given at the previous hearing that he expressly disclaimed that the men were anxious or desirous of performing overtime service; that they would much prefer performing six days' service a week and have a day of rest, and I commend him for the thought. It is a vicious principle that requires any man to work 7 days in the week, 365 days in the year. A very ready solution of it, so far as the ferries are concerned, can be found in assigning to the ferries, where the demands are the same every day in the year, a sufficient number of men so that no one man would be quired to perform more than six days' service in any one week. That would automatically relieve the situation so far as all the ferry companies are concerned.

At Detroit there is a 24-hour service. There they have the men on three 8-hour shifts, and the other ferry companies could work it out in the same fashion. That would take care of that situation, both as to customs and immigration officers, and it would automatically take care of the overtime. I do not see how the men in that service could then expect double time or double and a half time merely because it is a holiday, for they would then be working their 8-hour shifts six days in the week and they would get their regular day's pay

for each day. That would take care of Sundays and holidays as well as after 5 o'clock at night and before 8 o'clock in the morning.

STATEMENT OF MR. BASIL ROBILLARD, ATTORNEY FOR INTERNATIONAL RAILWAY CO., NIAGARA FALLS, N. Y.

110–111 Mr. ROBILLARD. * * * If you have three men on a 24-hour service, as you have always had in the past, and, if you extend that to the ferry companies, where they have regular schedules, you will give an opportunity for employment in the present situation of unemployment. That will relieve that situation. More than that, you will not require your men to work seven days a week.

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STATEMENT OF MR. WILLIAM E. TUCKER, BOSTON, MASS., REPRESENTING EL PASO ELECTRIC RAILWAY CO.

119 Senator CALDER. Your bridges have a 24-hour service—three 8-hour shifts of inspectors, both customs and immigration.

Mr. TUCKER. I understand so.

Senator CALDER. Of course, you understand that this bill did not contemplate that there should be any overtime charge for night work where there was a 24-hour service—three 8-hour shifts.

Mr. TUCKER. Of course, we are putting ourselves in the same situation as these other bridge companies. The collector is apparently successful, so far as the District Court for the Northern District of New York and the court of appeals is concerned.

Senator CALDER. I understand that only affects the overtime charge for Sundays and holidays.

Mr. ROBILLARD. So far as we are concerned we are only affected by overtime charges for Sundays and holidays; but we have been threatened that it will also affect night overtime. We have been told that we will have to pay the night overtime as well as Sundays and holidays. If he can claim overtime for Sundays and holidays, he can claim overtime for nights just as easily. If he is entitled to one, he is entitled to the other.

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STATEMENT OF MR. WILLIAM H. BOND, BOSTON, MASS., PRESIDENT NATIONAL ASSOCIATION UNITED STATES CUSTOMS INSPECTORS

130 Mr. BOND. I want to say a word in relation to the distinction Senator Calder mentioned during the hearing as between seaport and frontier work. Of course, I am familiar with the purpose of the legislation which is now the law, because I wrote the bill which was originally introduced, and I changed the bill to meet the desires of the subcommittee of the Committee on Commerce of which Senators Ransdell and Calder and President Harding were members. We considered every objection which was made to the terms of the bill, and with the assistance of the chief of the customs division we got a bill that seemed to be all right. To meet the condition at New Orleans, where the hours of labor are from 7 o'clock a. m. to 4 o'clock p. m., this proviso at the end of the bill was put in allowing collectors to adjust the inspectors' hours to the customary working hours at ports where the practices are different. This proviso also applies to the Canadian border at places where traffic is continuous during the 24 hours, such being the "customary

working hours"—and the inspectors work in 8-hour shifts without overtime. The same proviso is in the immigration bill, S. 1504, you will note, as in our law.

Senator RANSDELL. Which bill?

Mr. BOND. The existing law, Senator; the act of February 7, 1920. It is just the same as it is in Senate bill 1504. At the end of the bill it states that the collector is at liberty to arrange the hours of inspectors, not more than eight hours a day, to correspond with the customary working hours; and the department rightfully construed that, although it had special reference to New Orleans, it also applied to border ports, where the customary working hours are from 8 o'clock one morning until 8 o'clock the next morning; where traffic is moving across these magnificent structures at Niagara Falls and through these other places, back and forth, all the time. Consequently, at such places we don't work any more than eight hours. The inspectors along the border are satisfied with that. That is the practice everywhere along the border, wherever it can be done, to make no charge for overtime service during the week days—only for Sundays
132 and holidays. * * * Mr. Stanley has made the statement time after time that these men's work is not overtime until they have completed their regular day's work. We will concede what he has said, but to any man that works six days in the week the seventh day is overtime, according to the gospel or anything else, and he ought to have pay for it when he is working for somebody else's accommodation.

* * * * *

Mr. BOND. * * * Our men along the border work many nights, and, can you imagine, giving the very best of service on many long Sundays and never getting a cent for it at all! None of the railroads found fault that it was unjust to the men. All along the border these poor souls, getting $3.50 and $4 a day, didn't get anything for their overtime, service, but they come in under the law, which was the bill designed by our association, and expect to benefit through it. The principal benefit is at the seaports, because that is where most of the overtime is; but that is no reason the inspectors along the frontier should continue to work overtime for nothing. * * *

134 Two inspectors travel 111 miles from Detroit up to Gault and back, alternate days, working 16 hours every other day. He makes no charge for overtime, as it averages 8 hours a day. At Detroit and Buffalo and these other places where the Government tries to maintain a 24-hour day in furnishing service to the railroads and ferries and to the traveling public, there is no charge made for week-day overtime and I can give the gentlemen every assurance that no such bills as that will ever be rendered against the ferry companies or anybody else as long as the law stands as it is now. All we ask is that it be left as it is now, because the inspectors are satisfied, and these charges are being made as low and reasonable as they can be with justice to the inspectors who have to work under the conditions I have described.

Senator FERNALD. There seems to be no objection either by the railroads or the bridge or ferry companies about the charge that is to be made. That is a detail that can be worked out, I think, by the committee in some bill. But what objection have you to these charges being paid by the Government?

Mr. BOND. That is just exactly what the chairman of the Commerce Committee asked me. The reason I object to that is because I know the department won't pay them. Now, if I go to work at 5 o'clock at night and work until 8 o'clock in the morning, I get $13.12, which is the charge for working all night long. The Government won't pay me $13.12 for working that time. I don't know what they will do, but I know they won't do that because they can't.

Senator FERNALD. So that your real objection is that the Government would economize some in these charges?

* * * * *

136 Senator MCNARY. Do you charge for inspections on ferries?

Mr. BOND. On the seventh day.

Senator MCNARY. Do you charge for the six days?

Mr. BOND. For the six days no charge is made against the ferry companies on this side of the line.

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140 Mr. BOND. * * * One of the gentlemen made the remark in answer to Senator Calder's question that they have never had any

trouble before this bill of 1920 passed. Quite right. We had it, not they; we were the goats, not they. We had to furnish this overtime service free. Our men worked 13, 14, and 15 hours a day along the Canadian border without any overtime compensation at all. We were getting it at the seaports on cargo work, but never got it for baggage work. Why, I have worked as late as 11 and 12 o'clock at night, after working all day, on Christmas Day, on Sunday, and so on, without any extra compensation for it. The law which Congress gave us in 1920 was an emancipation proclamation for us which made life worth living. It bears down hard on these poor, downtrodden railroads. It costs them something. Ours was the burden from 1789, when the Government started doing this business, until 1920. Every inspector along the Canadian frontier, it bore down hard on him; it cost him his health; it cost him his comfort and his recreation; it caused him to render service to the traveling public at his expense, to render these accommodations at the cost of his own suffering. I don't know why it isn't fair that the burden should be shifted. They ought to have had it long ago, having had the accommodations. In these cases where it is unavoidable that the men should work beyond eight hours in the week days, and these are comparatively rare, or that they should work on Sundays, and we make that as low as we possibly can, overtime should be paid for.

* * * * *

141 Brief of National Association of United States Customs Inspectors

142 * * * To make the customs officer's day * one of 8 hours, and to include work in connection with passengers' baggage as well as cargo, both reasonable and both having the written assent of the steamship companies and no opposition whatever from any transportation company. Arguments in support thereof need not be here repeated, as the hearings and debate at that time show the purpose and intent of the bill. It is true that the congressional debates refer chiefly to steamship business, but that is a language of convenience and due to the fact that steamship business covers by far the greater part of customs officers' overtime. * * *

145 Much has been said by the railroad representatives about 24-hour service. Under the provisions of the act of February 7, 1920, "that in those ports where customary working hours are other than those hereinabove mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed," the Treasury Department has ruled that where railroad, ferry, or bridge traffic is continuous throughout the 24 hours, those are the "customary working hours," and has placed inspectors on duty in 8-hour shifts, and no charge is made against transportation companies for

overtime compensation on week days; the only charge being for Sundays and holidays, days which are universally recognized in all industries to be overtime. * * *

150 PORT HURON, MICH.,
January 31, 1922.

MR. W. H. BOND,
President National Association of Customs Inspectors,
Boston, Mass.

MY DEAR SIR: * * *

We have nine customs inspectors at the Grand Trunk Station, divided into three groups of three men in each group, to take care of the traffic for the 24-hour period. The 24-hour period is divided into 8-hour shifts, handled by three men each, who have to take care of all the incoming and outgoing freight trains, which total 40 trains for the 24-hour period. They also have to examine and pass 9 passenger trains inward and outward during this time. They also have to handle all the express and freight declarations for export during their shift and check in the imports. Therefore we do not think it unreasonable to charge them for the overtime performed on Sundays and holidays, and that is the only charge we make against them, namely, Sundays and holidays. Other industries in Port Huron, when they want their men to work on Sundays, pay them double time; why not the railroads pay when they get the overtime services of the customs officers?

You ask me how much overtime was paid by the Grand Trunk Railway for that particular train they mentioned in their brief for the year 1921.

My answer is, not one cent. We sent them statements of account at the end of each month, but so far those statements have been ignored and never paid. If this law is constitutional, our claims are just and should be paid without any parleying.

Fraternally yours,

JOHN MCCAFFERTY.

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5. Hearings before the Committee on Finance, United States Senate (71st Cong., 1st sess.), on H. R. 2667, which became the Tariff Act of 1930. The following excerpts from the Committee hearings relate to a proposal by railway companies that Section 451 of the Tariff Act of 1922 be amended to terminate the liability of railroad companies for overtime, either by abolishing overtime altogether or letting the Government pay it.

STATEMENT OF W. H. BOND, BOSTON, MASS., REPRESENTING THE NATIONAL ASSOCIATION OF CUSTOMS INSPECTORS

481 * * * * *

Section 451 provides the means whereby inspectors of customs and some other customs employees are paid for overtime services which they render beyond eight hours a day. This applies, of course, to all transportation companies, and the railroads seek exemption from those charges, claiming that it is an unnecessary and unjust burden upon them and should be eliminated or that the Government should pay it or that some other remedy should be given to them.

* * * * *

482 Mr. BOND. The ferryboats are now paying overtime only for Sundays and holidays.

They pay no week-day overtime, because in those companies, as I will explain a little later, the men work in 8-hour shifts.

Senator KING. Is that true of Mr. Mills's company at Detroit?

Mr. BOND. It is true of all the ferry companies; yes, sir.

Senator KING. That they are not paid except on Sundays and holidays?

Mr. BOND. That is all.

* * * * *

Senator SHORTRIDGE. If customs inspectors are paid for overtime, why are you concerned as to who pays them?

Mr. BOND. If you will be patient with me, Senator, I will come to that particular point a little later, because I want to elaborate on that just a little bit.

Senator SHORTRIDGE. I do not care to hear you elaborate on it. I just want to know why, if you get paid, you are concerned as to whether the Government pays you directly or whether the railroads pay you indirectly through the Government. Why are you concerned about it?

Mr. BOND. Because there is a double purpose about overtime. One is to compensate the customs officers for their overtime and the other is to act as a deterrent upon overtime; and I will explain in what manner they base that. If this deterrent legislation were not on the statute books the overtime which it would be necessary for the inspectors and others to work would probably be three or four times what it is now.

* * * * *

485–486 In 1871 Congress appointed a special committee to investigate the matter of customs overtime because the vessels had been desirous of working during overtime periods in getting out their cargoes, and they made private arrangements with the inspectors. They would say to an inspector, "We would like to work tonight. Will you look after us all right?" And the inspector would say, "Yes. It will cost you $10" or $20 or $50; or whatever money he happened to be in need of at that time, I presume he told them he wanted. But there was nothing regular about it. They paid him direct.

In any large body of men you will find some who will take advantage of opportunities for irregularity. It was desirable that that should be done away with.

This committee reported in 1872 or 1873. The resultant act was passed in 1873, which was the first overtime act and provided for the payment of this overtime by vessel owners to the collector under established regular rates and to be paid by him to the inspectors.

* * * * *

487 * * * Most of the overtime is on freight service, which is certainly decidedly irregular, as everybody knows. But even at that, in some of these places continuous service is important in freight service, such as at Detroit and Buffalo and other places of that nature where business is continually going on all the time. These men work in 8-hour shifts, three shifts during the 24 hours, and no overtime in-

such circumstances as that is charged against the railroad companies.

* * * * *

494 That was intended to apply to the port of New Orleans, to correct the situation which would prevail there if our language went through. But when this thing went into effect it was readily found that we were up against a peculiar situation on the Canadian frontier which we did not foresee; and the department construed, and we assented to it, that this should be applied to the Canadian frontier; that the department was at liberty to construe the usual working hours at a port like Detroit as 24 hours a day. Consequently, they could put these men on in three 8-hour shifts without violating this provision. That would make necessary the payment only where a man had to work seven days a week; he would be paid for that extra day; but during the 24 hours of any weekday it would be unnecessary to pay him anything, because a sensible and liberal interpretation of that clause, primarily intended for New Orleans, could easily be applied there.

Under the present law, with that proviso in it, all the free accommodation which is practicable and desirable can be given to the railroads on one condition, and that is that you gentlemen, the Congress of the United States, will give the department, the Bureau of Customs, an appropriation large enough so that they can hire the men necessary to put on these extra shifts of men. If you do not do that, of course they can not do it.

* * * * *

497 Senator SACKETT. If the Government were going to pay overtime in place of these railroads, would it be cheaper to put on separate shifts in the customs service?

Mr. BOND. Do you mean on the frontier?

Senator SACKETT. No; generally.

Mr. BOND. You could not do it at the seaports. It would be impossible, because you would have hundreds of men who would be on duty with absolutely nothing to do; and not only that, but the men working in the daytime can not turn over their work to other inspectors at night.

Senator SACKETT. Then take it at the frontier.

Mr. BOND. At the frontier there are some situations where it can be worked in three 8-hour shifts; and in those situations it is worked at the present time in three 8-hour shifts where the department has money to put those men on.

* * * * *

499-500 I have reported to the pier at 7 o'clock in the morning and waited all day at the pier, unable to go away even for lunch, because a fog kept the ship down the harbor, and we did not know when it was coming in. It might come in within 10 minutes; it might be at the end of the pier, and we could not see it, and would not know anything about it. I worked there one Christmas day from 7 o'clock in the morning until half-past 11 at night. After making an engagement to be at home with my family in the afternoon, I worked there all that day. It was the result of that day's work that caused me to sit down at my desk and write the terms of the Act of 1920. I was so filled with disgust and indig-

nation that I was impelled to do something to help the inspectors who were suffering every day and every night as I was doing.

* * * * *

Senator BINGHAM. Is there not a law that forbids them to work more than eight hours a day?

Mr. BOND. No, sir. An inspector of customs and any other customs employee is on duty 24 hours a day, except as provided by laws such as our overtime law. I work many Sundays that I do not get any compensation for, because it is in the interest of the Government. There are six of us station inspectors at the port of Boston. Every sixth Sunday one of us has charge of the port. We do not get any compensation. It is in nobody's interest but the Government's. We do not get any extra pay for that. We do that every sixth Sunday. There are many other cases where the discharging inspectors—not station inspectors—have to work, because on Sundays work is generally suspended, and places have to be covered by inspectors who get nothing for it. We are on duty whenever we are wanted.

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STATEMENT OF STUART K. BRANDON, OF NEW YORK CITY, REPRESENTING THE NATIONAL CUSTOMS SERVICE ASSOCIATION

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Mr. BRANDON. That act was carried right on; so that the only provision now, Senator, for the payment of overtime is the provision which provides that these vehicles must obtain a special license, and in order to do that they must pay the compensation of the Customs Service men

for the required services; and the customs men's pay is not on a per diem basis, but it is upon an annual basis. Now then, the collectors of customs being on an annual basis, they can—and I will not take the time to read numerous letters here—they can, if requirements make it necessary, make them work seven days a week, and all kinds of hours.

The vast majority of that overtime work would come about by reason of those special services rendered to those vehicles. There are some conditions that we cannot remedy now. We are unable to suggest how to remedy them.

Senator SHORTRIDGE. But they get paid for the overtime; do they not?

Mr. BRANDON. They get paid for it by the railroads now.

Senator SHORTRIDGE. I merely want to know how the inspectors are treated.

Mr. BRANDON. If the railroads do not pay them, no one can pay them.

We have a condition that we cannot remedy now. Take the men up on the Maine border, where there are roads and automobiles, etc., coming in all the time. These men work all kinds of hours, and there is no provision in the law to compensate them for that overtime. All they get is their salary.

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STATEMENT OF A. P. THOM, WASHINGTON, D. C., REPRESENTING THE ASSOCIATION OF RAILWAY EXECUTIVES

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599 The customs laws were framed when the business of the country was conducted during daylight hours, but the commerce of the coun-

try is now on a 24-hour basis. Inspection is necessary to protect the revenues of the United States by preventing smuggling. In all fairness and justice, a particular interest such as the railroads should not be asked to bear a financial burden for service that is not of interest to them or that they can not control, but is of direct interest to and for the protection of the citizens of the United States at large. The cost should be met through the means of general taxation in the same manner as funds are raised for the proper conduct of all other departments of the Government.

9. This subject has been presented to the Secretary of the Treasury in substantially the same form as that presented in this memorandum. In response to this submission, Hon. A. W. Mellon, Secretary of the Treasury, under date of January 4, 1927, addressed a letter to Mr. G. F. Snyder, legal representative of a number of the railroads involved, a copy of which is hereto attached, which concluded with the following paragraph:

> Considering the general Government policy that private interests should not pay for governmental services and also considering the modern conditions in connection with the movement of railroad passenger and freight trains at night I am of the opinion that the Customs Service should be in a position to furnish 24-hour service, including such service on Sundays and holidays, to the railroads crossing the international borders and that the railroads should not be compelled to pay for the services so rendered by the Government employees.

516 STATEMENT OF WILSON W. MILLS, DETROIT, MICH., REPRESENTING THE DETROIT AND WINDSOR FERRY CO.

* * * * * *

518-519 DETROIT, *July 20, 1929.*

Hon. REED SMOOT,
Senate Committee on Finance,
Senate Building, Washington, D. C.

DEAR SENATOR SMOOT: Will you be good enough to consider this letter and make it a part of the record of the hearings of the Senate Committee on Finance regarding customs overtime. I may still be considered as being under oath.

I understand it was stated to the committee that no amendment was needed to the present customs overtime act and that the commissioner only needed additional appropriation to render 24-hour service so that the ferry carrier would not bear any portion of the cost thereof. This statement in and of itself is probably correct but there are two practical matters to be considered: First, we have been endeavoring to have the Commissioner of Customs take care of this matter of overtime since 1924. He has taken care of it as to week days but it has not been taken care of as to Sundays and holidays. If it were done by an appropriation, an appropriation would be necessary every two years—why not cover it in the act itself and put the burden of paying overtime where, in my opinion, it belongs, directly upon the Government and not upon the 24-hour carrier. I think the theory of putting the charge on the carrier, even if by administrative order and by appropriation, the actual cost is borne by the Government, is wrong because as was said at the hearings, the

railroads, ferry, bridge, and tunnel companies are rendering 24-hour service and the cost for that should be placed directly where it belongs, that is, upon the Government.

Yours respectfully,

WILSON W. MILLS.

6. Hearings before the Committee on Immigration, United States Senate (71st Cong., 3d sess.), on S. 1126 and H. R. 3309, bills to provide for immigration inspectors overtime compensation similar to that provided by the 1911 Act as amended

STATEMENT OF GEORGE E. TOLMAN, COUNSEL AND WASHINGTON REPRESENTATIVE OF UNITED STATES IMMIGRATION INSPECTORS ASSOCIATION, MILLS BUILDING, WASHINGTON, D. C.

* * * * *

Senator KING. This bill, as I understand it—and I do not know that I do—seems to indicate that no one works at night; that all inspectors are inspectors calling for day labor. Do they not call for night labor, or from 2 o'clock in the afternoon for eight hours until the evening, without getting overtime after 5 o'clock?

Mr. TOLMAN. The customs officers could, of course, testify with more authority than I about the customs provisions, but as you will see in the text of the bill we have exactly copied the provisions extending to the customs, which provides overtime. Overtime in that law, as it has been enforced for the last decade, means duties performed after 5 o'clock in the afternoon and before 8 o'clock in the morning.

Senator KING. Why should not the employees in the Government service work after 5 o'clock?

Why should not the beginning of their service, for instance, commence at 2 o'clock instead of 8 o'clock in the morning?

Mr. TOLMAN. Correct.

Senator KING. You take it in the mines, they have the night shift and day shift; sometimes they have three shifts.

Mr. TOLMAN. That provision is taken care of in this way, Senator, where the men work in shifts, he does not have overtime.

Senator KING. Where a man works in shifts, he does not have overtime or overpay. Many prefer the night shift to day shift?

Mr. TOLMAN. That is right.

Senator KING. I am not saying now that the night shift ought not to call for larger compensation, but I am wondering why it is that these bills all presuppose there is only a day shift, commencing in the morning and terminating at 5 o'clock.

Mr. TOLMAN. There is no desire on the part of immigration officers to be paid overtime for the particular hours in the 24 in which they work—that is, as regards other hours in the 24. That situation is taken care of in these words in the bill:

> In those ports where the customary working hours are other than those heretofore mentioned, the Secretary of Labor is vested with authority to regulate the hours of immigration employees so as to agree with the prevailing working hours in said ports, but nothing contained in this section shall be construed in any manner to affect or alter the length of a working day for immigration employees or the overtime pay herein fixed.

Senator KING. Then you are contending for this two and a half times ordinary pay for an hour's work?

Mr. TOLMAN. Not at all. Simply because the work is a certain hour of the 24, the law would not be administered in a way to call for overtime, as you can verify by calling in Assistant Commissioner Dow, of the Customs Bureau, or others, who will inform you on that condition.

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STATEMENT OF JOHN W. VAN ALLEN, BUFFALO, N. Y.

28 Mr. VAN ALLEN. I am here particularly on behalf of the Peace Bridge at Buffalo, and I just want to supplement what Mr. Scott said.

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31 Senator JOHNSON. Mr. Van Allen, in order that I may understand the purport of what you say: The customs officials there maintain three shifts of eight hours each, 24 hours a day?

Mr. VAN ALLEN. Yes, sir.

Senator JOHNSON. They put no additional burden upon you?

Mr. VAN ALLEN. No, sir.

Senator JOHNSON. What are the shifts maintained by the immigration service?

Mr. VAN ALLEN. The same.

Senator JOHNSON. The shifts of eight hours each?

Mr. VAN ALLEN. Yes, sir.

Senator JOHNSON. Just the same?

Mr. VAN ALLEN. That is right.

Senator REED. They would not get any overtime, Senator.

Senator JOHNSON. Then, I do not understand the purport of the testimony.

Mr. VAN ALLEN. There is a bill in the Senate introduced by Senator Reed, and a House bill introduced by Mr. Jenkins, which provides additional compensation for certain hours when they work overtime, which happens usually to be charged back to the transportation companies. As amended in the House that does not apply to the border bridges or border railroads or airplanes or any passage by air on land.

Senator REED. But if there are three shifts there would not be any overtime.

Senator JOHNSON. That is the thing that impresses me.

7. Hearings before the Committee on Ways and Means, House of Representatives (75th Cong., 1st sess.), on H. R. 6738 (one of the bills which became the Customs Administration Act of 1938, amending Section 451 of the Tariff Act of 1930 (Act of June 25, 1938, c. 679, § 9, 52 Stat. 1082))

* * * * *

35 SYNOPSIS OF PROPOSED CUSTOMS ADMINISTRATION ACT OF 1937 (H. R. 6738)

* * * * *

SECTION 8

Provides for payment of overtime compensation in all cases where customs employees perform services outside regular hours of business, the expense to be borne by the person requesting such services. Such compensation is now authorized in most, but not all, cases.

STATEMENTS OF CLINTON M. HESTER, ASSISTANT GENERAL COUNSEL; WILLIAM R. JOHNSON, CHIEF COUNSEL, BUREAU OF CUSTOMS; AND STEPHEN J. SPINGARN, OFFICE OF GENERAL COUNSEL, TREASURY DEPARTMENT—Resumed

Mr. HESTER. We have covered section 9. Section 8 is on page 10 of the bill.

At the present time the Treasury Department has regular shifts on duty on nights, Sundays, and holidays at some ports of entry in the United States.

At ports of entry where we do not have regular shifts on Sundays, holidays, and nights the law authorizes the owner or operator of vessels or vehicles to requisition the services of customs employees for the purpose of supervising the unlading and lading of merchandise, baggage, and passengers, for the entering and clearance of vessels and vehicles, and for the issuing and recording of ship's documents, such as bills of sale.

Mr. DINGELL. With or without pay?

Mr. HESTER. With overtime pay.

Mr. DINGELL. Paid by the carrier?

Mr. HESTER. To be paid by the carrier.

It also frequently happens that exporters and importers desire the services of customs employees at these ports outside regular office hours for the purpose of segregating merchandise or manipulating merchandise.

It also happens outside regular hours that merchandise leaves the country or comes into the country otherwise than by a vessel, or by a vehicle, such as by driving cattle across the border.

The purpose of this amendment is to broaden the law, to permit exporters and importers and

persons who bring merchandise into the United States otherwise than by a vessel or vehicle to requisition the services of customs employees.

* * * * *

88 Mr. JOHNSON. There are certain situations at the present time where customs facilities are furnished outside of regular hours of business under circumstances in which the employees must work without any extra compensation. This will remedy that situation by providing that the person for whose benefit the services are performed must stand the cost at the rate provided in the Overtime Act.

Mr. MCCORMACK. Under the Overtime Act, the overtime is payable only to certain classes of employees, is it?

Mr. JOHNSON. The Overtime Act applies to all classes of customs officers who work overtime, but not to all cases in which services may be furnished.

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89 Mr. MCCORMACK. Take the Detroit situation. When the men work overtime on the ferries, do they get overtime pay?

Mr. JOHNSON. I do not believe there is any overtime work on the ferries.

Mr. MCCORMACK. They get compensatory time?

Mr. JOHNSON. Yes, sir.

Mr. MCCORMACK. Do they not get overtime under the provisions of this law, that is, the men who work on the ferries?

Mr. JOHNSON. No, sir; not under the present arrangement since there is a 24-hour service there.

* * * * *

92 Mr. McCORMACK. Is there any type of overtime work that these men do under existing law that they do not get paid overtime for?

Mr. JOHNSON. At the present time there are overtime services performed without compensation——

Mr. McCORMACK (interposing). Is this paragraph not aimed to meet that situation?

Mr. JOHNSON. Yes, sir.

Mr. McCORMACK. In other words, the purpose of this paragraph is to see that the employees working overtime, insofar as it is practically possible, receive pay for all of that work that they do?

Mr. JOHNSON. Yes, sir.

Mr. McCORMACK. It is also intended that all these employees doing overtime work receive overtime pay?

Mr. JOHNSON. That is so where such services are for the benefit of an individual rather than for the public generally.

Mr. McCORMACK. Naturally, the Government does not pay for that, but it is the individual benefited who pays for it?

Mr. JOHNSON. Under the present law, there are cases where the individual does not bear the burden. It is true that there is no extra compensation to be paid by the Government, but the employee bears the burden; he does the work without getting paid for it. That is true, for example, in the case we cited of the movement of cattle.

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Mr. McCORMACK. As I understand you, the lines on page 10, from line 23 on page 10 to line 2 on page 11, are unnecessary?

Mr. JOHNSON. We would have to consider that. It was drafted with the thought of completing a whole idea and avoiding in the new law any conflict with the platoon system. That is, there are certain services performed outside of regular office hours but on regular tours of duty for the benefit of the general public for which no overtime is or should be paid. The situation there is a familiar one in many industries which operate 24 hours a day.

Mr. McCORMACK. The men in Detroit work on the 3-platoon system?

Mr. JOHNSON. Yes.

Mr. McCORMACK. That system does not apply in ports like New York and Boston?

Mr. JOHNSON. Only with respect to certain classes of employees, such as guards.

Mr. McCORMACK. And the reason for the three-platoon system is because of the location of that particular port?

Mr. JOHNSON. That is true. There is a large population concentrated on each side of the border and a concentration of heavy traffic.

Mr. McCORMACK. With many thousand of persons coming across daily from Canada into the United States, being employed in the United States?

Mr. JOHNSON. There is heavy traffic at all hours.

Mr. McCORMACK. I wish you would look into the conditions as to rotating on Sunday work.

Mr. JOHNSON. I shall be very glad to do that.

Mr. McCORMACK. Mr. Dingell and I have talked that over a number of times.

Mr. JOHNSON. I am under the impression that there is some rotation system, but I shall check on that.

130 "DETAILED SECTION-BY-SECTION ANALYSIS OF H. R. 4675 SUBMITTED BY THE TREASURY DEPARTMENT.

* * * * * *

132 SECTION 8. Section 451 of the Tariff Act of 1930 (U. S. C., 1934 ed., title 19, sec. 1451) authorizes the assignment of customs officers and employees to overtime duty, and the payment of such overtime by the requesting master, owner, or agent only in connection with the unlading or lading under special license of merchandise, baggage, or passengers, the entering or clearing of a vessel or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title.

Merchandise, baggage, and persons may arrive otherwise than by vessel or vehicle, as in the case of livestock driven into the country. Moreover, overtime customs services are sometimes requested for the benefit of importers or exporters in connection with the segregation or manipulation of merchandise and in various other circumstances not included in the above enumeration. At ports and stations where the volume of business does not justify the employment of extra shifts of personnel to serve the public, these requests cannot be granted at the present
133 time without requiring customs officers and employees to work overtime without com-

pensation. The proposed amendment of the law is therefore deemed desirable to eliminate present inequities by uniformly requiring the payment of overtime compensation for all overtime services performed on special request and for the benefit of particular importers, exporters, or carriers. This requirement will not be applicable, of course, when there is a regular shift on duty.

180, 181 STATEMENT OF ELI FRANK, JR., BALTIMORE, MD., REPRESENTING NATIONAL CUSTOMS SERVICE ASSOCIATION

Mr. FRANK. Mr. Chairman, my name is Eli Frank, Jr., my address is 111 North Charles Street, Baltimore, Md., and I am representing the National Customs Service Association.

* * * * *

Section 8 appears on page 10 of the bill and on page 15 of the comparative print.

The intent of section 8 apparently is twofold: First, to extend the provisions of the Customs Overtime Act to cover cases where customs employees are required to perform services at night, or on Sundays or holidays not specifically covered by the existing overtime law, but which are for the benefit and profit of private interests. Second, to clarify the existing law so as definitely to present a statutory basis for the present administrative practice of not requiring payment of overtime compensation to customs officers at border ports, who are working in shifts, and who therefore work a full week, but at other than regular hours, and who do not at present participate in overtime compensation.

In its present form, section 8 will not effectuate the desired result. For this reason, the following changes are respectfully suggested:

First, strike out lines 23, 24, and 25 on page 10, and lines 1 and 2 on page 11.

The language of this proposed amendment to section 451 of the Tariff Act of 1930 is such that it might eliminate payment by private interests of overtime compensation for services performed at their request and for their pecuniary benefit by customs officers and employees at other than regular hours.

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183 Also, we want to add at the end of section 8 these words:

and such section 451 is further amended by adding at the end thereof the following:

"The authority to regulate hours now vested in the collectors of customs by the last proviso of section 5 of the act of February 13, 1911, as amended, shall not include the authority to make assignments to regular duty on Sundays or holidays, either by day or at night, in compliance with such requests, in the place of assignments to regular duty on other days or nights."

* * * * *

The authority to regulate hours to conform to customary private working hours of the port; if other than from 8 a. m. to 5 p. m. was placed in the act of February 7, 1920, which was in the nature of an amendment to the act of February 13, 1911. This proviso was placed in the act for the purpose of giving to the Collector of Customs at New Orleans the authority to regulate the working hours of customs officers to agree with the prevail-

ing hours of working vessels of 7 a. m. to 4 p. m. at that port, and for no other reason. That is referred to in the hearings before the Committee on Commerce, United States Senate, Sixty-seventh Congress, entitled "Overtime Pay of Customs and Immigration Employees," on page 17,

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185 STATEMENT OF R. R. BOYNTON, REPRESENTING NATIONAL CUSTOMS SERVICE ASSOCIATION

Mr. BOYNTON. Mr. Chairman, my name is R. R. Boynton; I am representing the National Customs Service Association.

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What I would like to make very clear to the committee, if it is possible to do so, is this. We do not desire to have to work on Sundays or holidays.

We feel in the service that even on the border there are many instances where service is requested that is avoidable.

Your honorable body, in the act of 1920, section 5 of that act, which amended the act of February 13, 1911, provided for overtime, plus a limitation upon regulation of hours by collectors of

186 customs, according to the last six words in the last proviso of section 5 of the act of 1911, as amended by the act of February 7, 1920.

Those last six words, after reciting that the collectors were vested with authority to regulate hours to conform to the customary working hours of the force, covered the situation existing at New Orleans, where the usual hours are from 7 o'clock a. m. until 4 o'clock p. m. That act of 1920 was our emancipation proclamation. That fixes our

hours from 8 o'clock a. m. to 5 o'clock p. m., with an 8-hour day. We had never had that before.

While the department had construed the sunrise to sunset bill to mean from 7 o'clock a. m. to 6 o'clock p. m., we had usually been required to work a 10-hour day. The act of 1920 gave us an 8-hour day. But at New Orleans they have been working from 7 o'clock a. m. to 4 o'clock p. m., and not from 8 o'clock a. m. to 5 o'clock p. m. And in order not to penalize either the dock employees or the other people at New Orleans, or the customs officers, and force them to work over hours before or after the regular hours, that provision was placed in the law. After reciting that the collectors of customs were vested with authority to regulate hours, Congress placed a limitation in the law to the effect that in such regulation of hours the length of the working day would not be altered, or the overtime pay herein fixed.

On the border they work 24 hours a day in a good many cases. We have no quarrel with that. There is a certain amount of consideration that has to be given to public business.

But we do not want to work on Sundays.

* * * * * *

188–189 Mr. DINGELL. By ruling of the Treasury Department, the ferry company was given special classification, which these employees contend has never been authorized by Congress, but that ruling of the Treasury Department was made for the ferryboats because there was competition between the ferry company and the international bridge, and the contention is, or rather the Treasury Department said the ferry company could not stand the competition, and therefore we will ex-

empt them from paying that added service cost. But so far as these people are concerned, if an employee is called upon to make an examination, they have no objection to that, but they do not want compensatory time off; they want to be paid overtime. Time off on Friday for service rendered on the previous Sunday is mighty poor compensation.

Mr. REED. Why should they not be paid overtime?

Mr. DINGELL. When they are paid overtime that amount should be reimbursable to the Government from the coffers of the steamship company.

Mr. REED. Why is not that fair?

Mr. BOYNTON. It is.

Mr. DINGELL. It is absolutely fair.

Mr. BOYNTON. Principally that was because there was not enough law. We cannot blame Congress, but there was not enough law to cover the competition that the ferries were facing. The bridge and tunnel were not covered by the law, and being so ruled by the courts, the ferry companies were brought down to the level of the bridges and tunnels rather than having the bridges and tunnels being required to reimburse the Government for that service. We would like to see that provided for in your measure.

8. Congressional debates on the proposed Customs Administration Act of 1938, amending the Tariff Act of 1930

IN THE HOUSE

81 Cong. Rec.

9391. Mr. ANDREWS. Mr. Speaker, the provisions of section 8 of this act in amendment

of section 451 of the Tariff Act of 1930 would permit the Treasury Department or the Bureau of Customs, should it so desire, to charge overtime at all international bridges, both public and private, to the bridge companies themselves. This would affect the bridges at Brownsville, El Paso, Detroit, Buffalo, Niagara Falls, and in the St. Lawrence region. This situation was brought to the attention of Members of Congress thus involved. We have no fault to find with the bill because we were assured by the gentleman in charge of this bill, Mr. Cullen, and the gentleman from Massachusetts [Mr. McCormack] and also by representatives of the Treasury Department that there is no intent on the part of the Treasury Department to interfere with the present method of handling matters at the bridges.

Mr. CULLEN. May I say to the gentleman that his statement is absolutely true. This will cure that defect.

Mr. ANDREWS. For the purpose of making it a matter of record, I understand these gentlemen will favor an amendment by the Senate, and those concerned have drawn an amendment to the bill which would come in at the end of section 8 after the words "public interests" and which will correct the situation.

* * * * * *

Mr. ANDREWS. Copy of amendment to section 8 of H. R. 8099 as proposed and agreed upon:

> At the end of section 8, after the words "public interest," insert the following: "or to authorize the collection of overtime compensation for services of a kind which were

being regularly performed by customs officers or employees assigned to regular tours of duty at nights or on Sundays or holidays in connection with international traffic over ferries or highway bridges or through highway tunnels on July 1, 1937, and which shall hereafter be performed in connection with such traffic."

* * * * *

Mr. ANDREWS. * * * If the proposed amendment to section 451 of the Tariff Act of 1930 shall become a law the Treasury Department may impose upon international bridges the obligation to pay overtime of customs employees. For proper consideration of the proposed amendment it is essential to consider section 5 of the act entitled "An act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes," approved February 13, 1911, as amended, which is referred to in section 451, is as follows:

* * * * *

9392 Under section 451 as now constituted an obligation to give a bond to pay the compensation and expenses of customs officers and employees assigned to duty at night or on Sunday or a holiday is limited to the master, owner, or agent of any vessel or vehicle. Under the proposed amendment the obligation is imposed upon the owner, master, or person in charge of a vessel or vehicle, common carrier, or consignee of any merchandise or baggage. The operator of a toll bridge has been held to be a common carrier.

When the act of February 13, 1911—section 5 above quoted—was amended on February 11, 1920, to enlarge the provisions to relate to the examina-

tion of passengers' baggage, the collector of customs threatened to close the bridges of the International Co. spanning the Niagara River between the United States and Canada unless the company would give a bond in the sum of $500,000 and agree to pay at double-time rate the salaries of the inspectors stationed at the bridges after 5 o'clock at night and before 8 o'clock in the morning and at any time on a Sunday or holiday. From this arose the injunction action brought by the International Co. against Davidson as collector of customs.

The Supreme Court of the United States in that case held that the words "vessel or other conveyance" in section 5 of the act of 1911 as amended by the act of 1920 were inappropriate to describe the plant of a toll bridge; that it was not the purpose of Congress to make it applicable to the conduct of a toll bridge or the operation thereon of a line of passenger trolley cars.

The proposed amendment to section 451 to include common carriers might be construed as adequate to describe the plant and operation of a toll bridge. The so-called saving clause proposed to be enacted as the last sentence of section 451, reading as follows:

> Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at night or Sunday or holidays when such assignments are in the public interest—

imposes no duty upon the Treasury Department to assign customs officers or employees to regular

tours of duty at night or on Sundays or holidays. The sentence merely clarifies the intention to preserve the existing authority of the Treasury Department to make such assignments if it wills to do so. If the Treasury Department decides not to assign customs officers or employees to regular tours of duty after 5 p. m. and before 8 a. m. or on Sundays or holidays, and the operator of a bridge between the United States and Canada or between the United States and Mexico desires to keep the bridge open, as it obviously would, on Sundays and holidays and during some part of if not all of the night, it could be required to give a bond by the terms of which it would agree to pay the compensation and expenses of customs officers and employees assigned to duty at the periods mentioned.

The amendment to the last sentence of section 451 of the Tariff Act of 1930 suggested above would preserve the rights of bridge companies as determined by the Supreme Court of the United States (*International Co.* v. *Davidson*, 257 U. S. 560) and remove the option to the Treasury Department by change of policy or personnel to curtail regular tours of duty for the purpose of collecting additional compensation where it would be in the public interest not to curtail customs service, and it would also make this law conform to immigration laws.

Mr. McCORMACK. Mr. Speaker, will the gentleman yield?

Mr. ANDREWS. I am glad to yield to the gentleman from Massachusetts.

Mr. McCORMACK. May I say that the gentleman from New York, Mr. Andrews; the gentle-

man from New York, Mr. Reed; and the gentleman from New York, Mr. Mead, representing constitutents of theirs in connection with the international bridge, had a conference with the gentleman from New York [Mr. Cullen], another member of the Committee on Ways and Means, and me. The Treasury Department never intended to disturb the situation which exists at the international bridge or at Detroit at the present time, and certainly this was not the intention of the committee.

May I compliment the three gentlemen from New York on so zealously fighting for an amendment which will definitely clinch the matter.—I hope their constitutents will remember it at the right time.

9. Hearings before a subcommittee of the Committee on Finance, United States Senate (75th Cong., 3d sess.), on H. R. 8099 (one of the bills which became the Customs Administration Act of 1938, amending the Tariff Act of 1930)

STATEMENT OF STEPHEN J. SPINGARN, ATTORNEY, OFFICE OF THE GENERAL COUNSEL, TREASURY DEPARTMENT

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Mr. SPINGARN. The next section I would not classify as controversial, but because there has been a good deal of interest in it, I think it worth calling to the special attention of the subcommittee. That is section 8.

* * * * * *

In other words, existing law specifically enumerates circumstances in which private par-

ties can request and pay for the services of customs employees for overtime purposes, such as, for example, when a vessel comes in to a port at some time after the customhouse at that port is closed at night or on Sunday. But because it specifically enumerates the circumstances, the type of cases in which persons may request these overtime services is restricted and excludes various other types of circumstances in which the furnishing of overtime services is believed to be desirable. This amendment will permit the furnishing of such services to, and the payment for them by, importers, exporters, and others who need overtime services of customs employees in all cases where they request such overtime services.

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20 STATEMENT OF JOHN W. VAN ALLEN, BUFFALO, N. Y., REPRESENTING THE BUFFALO AND FORT ERIE PUBLIC BRIDGE AUTHORITY

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21 Mr. VAN ALLEN. * * * Shall I read the amendment?

Senator WALSH. I wish you would.

Mr. VAN ALLEN [reading]:

> At the end of section 8, after the words "public interest," insert the following:
>
> "Or to authorize the collection of overtime compensation for services of a kind which were being regularly performed by customs officers or employees assigned to regular tours of duty at nights or on Sundays or holidays in connection with international traffic over ferries or highway bridges or through highway tunnels on July 1, 1937, and which shall hereafter be performed in connection with such traffic." * * *

Mr. VAN ALLEN. Yes. As the law exists today they cannot charge the bridge companies for overtime services on international bridges because in the preceding act it refers only to vessels, merchandise, baggage, passengers, and so forth, but it does not refer to bridges.

Senator WALSH. In other words, the present act refers to rail terminals and water terminals?

Mr. VAN ALLEN. Yes, sir. So that at the present time the Treasury Department has no discretion under which they may impose these charges upon international bridges for overtime services. Now, if this bill goes through, in our view of the situation, it does give the Treasury Department discretion to impose this charge for extra-time service on international bridges.

Now, the Treasury Department has said that they have no intention of charging it even though the discretion may be there. Nevertheless, in 1921 the Treasury Department thought they had that discretion and attempted to impose that charge, and hence this litigation which resulted in a decision that they could not as the law existed, but as it is reinstated now, we feel that they would have discretionary power to charge for this extra time service. The purpose of the amendment is to clarify that situation so that that discretion is not left with the Treasury Department.

Senator VANDENBERG. What is the fact? Is there a great deal of overtime service on these bridges?

Mr. VAN ALLEN. Most of the bridges run 24 hours.

Senator VANDENBERG. And there is overtime?

Mr. VAN ALLEN. Yes. That is, there are three shifts of 8 hours each.

Senator VANDENBERG. That is not overtime if they work in shifts.

Mr. VAN ALLEN. I mean this act would give the Treasury Department discretion, as we think, to charge for everything excepting an 8-hour day shift.

Senator WALSH. It would permit the Treasury Department to take a shift that ran for 8 hours in the day and continue it on into the night and charge for overtime?

Mr. VAN ALLEN. That is right, sir.

Senator WALSH. Is this amendment favored by the customs officials on these international bridges?

Mr. VAN ALLEN. By the customs officials?

* * * * * *

Mr. VAN ALLEN. * * * Now, the Treasury Department says it has no intention of exercising such a discretion. Well, in 1922, under the preceding administration, the Treasury Department attempted to do that very thing, and we do not want to take any chances. We are perfectly satisfied that this present Treasury Department does not have any intention of using its discretion, but changes take place in Washington now and then.

Senator WALSH. You think the present law gives the Treasury Department that discretion?

Mr. VAN ALLEN. I think the new bill gives the Treasury Department discretion.

Senator WALSH. Not the present law?

Mr. VAN ALLEN. Not the present law.

Senator WALSH. You are objecting to this new bill having such broad language as to give that discretion?

Mr. VAN ALLEN. Yes.

Senator WALSH. You want that discretion eliminated and the present law to stand?

Mr. VAN ALLEN. By the adoption of this amendment.

Senator WALSH. Which will make it clear that they have no discretion?

Mr. VAN ALLEN. Yes; the members of the Ways and Means Committee, Mr. Cullen and the others, also felt that if this bill did give discretion to the Treasury Department it ought to be limited.

Senator WALSH. Does the Treasury Department have any opinion on this proposal?

Mr. SEINGARN. I do not think the Treasury Department will have any objection, in principle, to the amendment. We would like an opportunity to comment on the specific language.

Senator WALSH. Very well.

Mr. SEINGARN. We will make a report to you on that, just as in the case of the Ways and Means Committee.

Senator VANDENBERG. I should like to ask as to the effect on the customs employees. At the present time, even though they work in shifts, are there occasions when they do have to work overtime?

Mr. VAN ALLEN. No, there is no occasion when they have to work overtime. There are times when they are very accommodating and come back, when the traffic is particularly heavy, but they do that as a courtesy to the public.

59 STATEMENT OF ELI FRANK, JR., BALTIMORE, MD., REPRESENTING THE NATIONAL CUSTOMS SERVICE ASSOCIATION

Mr. FRANK. * * * It is clear that
60-61 the Treasury Department proposed only that section 8 extend the provisions of the overtime law to all overtime services performed on special request. At the time that H. R. 6738, the predecessor bill, was being considered by the Committee on Ways and Means of the House of Representatives, the National Customs Service Association proposed the following amendment at the end of section 8 of H. R. 6738, by adding the following to the end of section 451 of the Tariff Act of 1930:

> The authority to regulate hours now vested in the collector of customs by the last proviso of section 5 of the act of February 13, 1911, as amended shall not include the authority to make assignments for regular duty on Sundays or holidays, either by day or at night, in compliance with such requests in the place of assignments to regular duty on other days or nights.

The reasoning behind this proposed change was in substance as follows: No man wishes to work on Sundays or holidays if such service can be avoided. Sundays and holidays are the days when children are at home and families gather. Church going means as much to many customs employees as it does to many other citizens of our country. Consequently, no day in the week can compensate a man for time away from home on Sundays or holidays. It should be noted at this point that the amendment proposed by the National Customs Service Association sought not to compel the pay-

ment of overtime for night work, nor the abolition of the platoon system, but merely the privilege to employees to spend Sundays and holidays with their families, a privilege that most of our citizens now enjoy and jealously guard. If the employees' services should be necessary for the operation of a toll bridge on Sunday, it seemed only just that the employee be reimbursed for his service, which is, in the final analysis, for the benefit of private commercial interests.

At the time when this amendment was being considered by the Ways and Means Committee of the House, the National Customs Service Association was informed that this amendment granting the employee the right to spend his Sundays and holidays at home, involved a change in the law, since it impaired the authority of the Treasury Department to assign officers on regular tours of duty on Sundays or holidays. In order to make certain that such authority in the Department was to remain unimpaired, the last sentence of the present section 8 was inserted as follows:

> Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular duty at nights or on Sundays or holidays when such assignments are in the public interest.

The association is satisfied with the bill as passed, embodying the compromise as reached between the Treasury Department and the association. If, however, the section is to be reopened to amendment by suggestions from private interests, the association is forced back to insistence on consideration of its original proposal.

We wish to emphasize that the House bill is a compromise, crystallizing the present situation as to overtime compensation at border points, and leaving the Department full discretion to deal with those matters as the public interests may require.

* * * * *

63 STATEMENT OF R. R. BOYNTON, DETROIT, MICH., REPRESENTING THE NATIONAL CUSTOMS SERVICE ASSOCIATION

Senator WALSH. Your name is R. R. Boynton?

Mr. BOYNTON. Yes, sir.

Senator WALSH. Your residence is Detroit, Mich.?

Mr. BOYNTON. Yes, sir.

Senator WALSH. You represent the National Customs Service Association?

Mr. BOYNTON. Yes, sir; chairman of the overtime committee of the National Customs Service Association. Mr. Frank, our attorney, has stated our case very clearly. The only thing is, if there is a question I will endeavor to answer it.

Senator VANDENBERG. I would like to ask Mr. Boynton if he is familiar with the protest that was made by the Detroit overtime committee, Mr. Anthony P. Geissler, chairman, in regard to this general problem in 1937?

Mr. BOYNTON. That dates back to the time of the opening of the bridge, Senator; that is the Ambassador Bridge from Detroit to Sandwich, Ontario. At that time the Department, utilizing its discretion under the last proviso of section 5 of the act of 1911, as amended, deemed it unfair to the ferry company between Detroit and Wind-

sor, on account of the decision of the Supreme Court in the *Niagara Falls bridge case* which is cited in Mr. Frank's statement, although I do not think he gave the citation, it is 257 U. S. 506. The ferry company was being required to pay for overtime compensation of customs officers on Sundays and holidays, not at night. The bridge company, on account of the decision in the *Niagara Falls bridge case*, would not be required to do so, and the set-up that was provided at that time was for officers assigned to the bridge to be given a day off a week at public expense in lieu of Sunday. The same arrangement was made for the ferries.

The protest that Mr. Geissler refers to there is predicated upon the law and the decision of Judge Tuttle in the *Port Huron-Sarnia* v. *Lawson case*, which decided that ferries were squarely in the law and should pay the overtime. Of course, there was a question, and a very large question of injustice, and it is recognized by the employees that it would be an injustice to require the ferries to pay the overtime and not require other facilities more modern to do the same. The law has not kept abreast of the change in facilities. When the bridge was built at Detroit and when the tunnel was built at Detroit they, to a large extent, displaced the ferries.

Senator VANDENBERG. Would you be in a position to state how Mr. Geissler's committee and their problem would be affected by this pending legislation?

Mr. BOYNTON. There would be no change. The problem would still exist, so far as they are con-

cerned, if there is no change in this section 8 as passed by the House. If the amendment which was advocated by the National Customs Service Association before the Ways and Means Committee on the hearing on H. R. 6738 had been incorporated into the law, it would have required bridges and any other facilities eventually to pay for Sunday and holiday service as overtime.

* * * * * *

64 Mr. SPINGARN (Mr. Stephen J. Spingarn, attorney, Office of the General Counsel, Treasury Department). Senator Vandenberg, the other day you asked us to prepare a brief statement for you on the Detroit customs situation. We have it here with us, and we will give it to you now.

Senator VANDENBERG. I would like to put it into the record after I have read it, Mr. Chairman.

Senator WALSH. Very well.

(The statement referred to is as follows:)

MEMORANDUM FOR SENATOR VANDENBERG

Certain customs employees at Detroit, represented by Mr. Anthony P. Geissler, contend that:

1. Customs inspectors are entitled to extra compensation under the Overtime Act (U. S. C., title 19, sec. 267) if they work between the hours of 5 p. m. and 8 p. m. or on a Sunday or holiday, even though such work is performed during regular 8-hour tour of duty; and

2. That the Secretary of the Treasury cannot properly authorize the assignment of customs employees to regular tours of duty on Sundays and holidays because there is no

authority of law for allowing compensatory time off to employees so assigned.

Under existing law the operators of International highway bridges and tunnels cannot be required to reimburse the United States for the compensation of customs employees assigned to such places for customs work at nights or on Sundays or holidays. [(*International Railway Co.* v. *Davidson* (1922) 257 U. S. 506.)], but customs facilities must be maintained at such places if required by the volume of traffic.

When the Ambassador Bridge was opened at Detroit on November 15, 1929, it was necessary to add 26 new inspectors to the local customs force to maintain customs facilities at the bridge for 24 hours each day and 7 days each week. The employees were assigned under a platoon system under which each employee assigned to duty at the bridge worked not more than 8 hours a day and not more than 6 days a week on his regular tours of duty. Sunday and night work was rotated among the men. In order to prevent discrimination a similar system was installed with respect to the customs facilities at the ferry docks at Detroit, and five additional inspectors were employed for this purpose. The customs inspection at the ferry docks had previously been performed on Sundays and holidays by customs inspectors who had already served on their regular tours of duty and these employees received extra compensation under the Overtime Act for the extra work, the Government being reimbursed by the ferry company for the extra compensation paid.

The assignment of customs employees to regular tours of duty at nights or on Sundays or holidays is clearly authorized by the

Overtime Act, section 624 of the Tariff Act of 1930 (U. S. C., title 19, sec. 1624), and sections 161 and 249 of the Revised Statutes (U. S. C., title 5, sec. 22 and title 19, sec. 3). A decision of the Comptroller General rendered on September 15, 1936 (16 Comp. Gen. 243), held that a former customs employee in the Michigan district was not entitled to extra compensation for services he performed on Sundays and holidays during the period 1929 to 1933.

It is not the purpose of section 8 of the H. R. 8099 to deprive any customs employee of overtime compensation to which he is entitled under existing law. On the contrary, it is designed to provide for the payment of extra compensation in cases where customs officers now perform overtime services for the benefit of private interests without receiving extra compensation.

The Treasury Department does not favor the employment of customs employees beyond their regular working hours where this can reasonably be avoided because the employees render more efficient service if permitted to enjoy regular intervals of rest and relaxation. It is also to be noted that if employees assigned to duty during the full week were permitted or required to work overtime regularly at nights or on Sundays and holidays, fewer employees would be needed and a reduction of the force would probably result.

* * * * *

STATEMENT OF CLARENCE R. RUNALS, REPRESENTING THE INTERNATIONAL RAILWAY CO.

* * * * * *

Mr. RUNALS. * * * At the end of section 8 after the words "public interest" add the following:

> "Vessel" or "vehicle" as used herein shall not be construed to include a highway bridge or a highway tunnel, nor shall the maintenance or operation of such a bridge or of such a tunnel constitute the owner or operator thereof a common carrier within the meaning or application of this section.

* * * * *

APPENDIX D

LETTERS

1. *Letter of April 10, 1885, from the Collector of Customs at Detroit, Mich., to the Secretary of the Treasury (Report of the Secretary of the Treasury on the Collection of Duties, 1885, pp. 168–171)*

CUSTOMHOUSE, COLLECTOR'S OFFICE,
Detroit, Mich., April 10, 1885.

SIR: I have the honor to acknowledge the receipt of circular letter from the Department, dated the 1st instant, asking a report in writing as to what reductions are practicable in the customs force employed in this district, &c.

* * * * *

There are employed at the customs office at the city ferry eight officers. At this point boats are arriving from and departing for Windsor, Ontario (a place of about ten thousand inhabitants,) every five minutes, and in the summer month oftener. These boats are in motion from sunrise till 11 and 12 o'clock at night, according to the season. Large quantities of produce and dutiable goods of greater or less value are continually arriving by these boats daily. Hundreds, and during the summer months thousands, of persons cross and recross on these boats. Wagons, carriages, and vehicles of all kinds are

crossing and recrossing without cessation. All this business requires the constant and vigilant supervision of the force stationed there. * * * One officer of the force stationed here is on duty all night during the season of navigation, to receive reports and grant clearances to vessels.

* * * * *

At the Michigan Central and at the Grand Trunk Railway freight-depots are stationed six officers, three at each, whose duties are to attend to the inspection of all importations by rail arriving at these points, cording and sealing bonded goods, checking out contents of cars arriving in transit through Canada from eastern United States points, and which have been held for any reason, as for defective sealing, irregular manifests, &c. These officers are employed regularly from 7 o'clock A. M. till dark, and very often through the entire night, so that there may be no delay to the railroad traffic. Those stationed at the Michigan Central depot, in addition to their duties at that point, also perform the same duties with reference to cars arriving at the Wabash depot, half a mile below their station.

* * * * *

The boats of the Michigan Central Railroad each carry twenty-four cars at a load; those of the Grand Trunk carry, one of them fourteen and the other eighteen cars.

All of these boats run *nights, days,* and *Sundays,* with *no* cessation whatever, the year through; and *all cars* in transit between east and west arriving

at and departing from this port by the Michigan Central, Grand Trunk, and Wabash Railroads are *crossed on these boats.*

Six officers are employed on one of the Michigan Central, and a like number on one of the Grand Trunk boats, divided into reliefs of two men, and each relief working eight hours. On the other Grand Trunk boat three officers are employed, one man to each relief. On the other Michigan Central boat four men are employed, the extra man, when not needed on the boat, being assigned indifferently where most needed, but ordinarily he is employed to aid the regular reliefs in clearing the large passenger-trains arriving from the East, so that there may be the least possible delay and inconvenience to the travelling public.

* * * * *

In summing up, I am, therefore, compelled to say that if the Department desire to continue the present system of business, affording all the facilities that are now furnished railroads and transportation companies, it will be impossible to reduce this force. In other words, a reduction of the force must necessarily be accompanied by a reduction in the facilities now afforded these lines.

* * * * *

W. LIVINGSTONE, Jr.,
Collector.

Hon. DANIEL MANNING,
Secretary of the Treasury,
Washington, D. C.

2. Letter of June 4, 1943, from the Commissioner of Customs to Francis M. Shea, Assistant Attorney General

TREASURY DEPARTMENT
BUREAU OF CUSTOMS
WASHINGTON

Seal
Office of the Commissioner

Address reply to
Commissioner of Customs

JUNE 4, 1943.

Honorable FRANCIS M. SHEA,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

Attention: Mr. Paul Sweeney.

SIR: In connection with the case of *Howard C. Myers* v. *The United States*, in which the Court of Claims has held that customs officers and employees are entitled to overtime compensation under section 5 of the Act of February 13, 1911, as amended by the Act of February 7, 1920 (U. S. C. title 19, sec. 267), for services performed at night or on Sundays or holidays on regular tours of duty, representatives of your Department have requested further information from this Bureau as to (1) whether it has ever been the practice at any of the ports to pay overtime compensation for services performed on regular tours of duty, and (2) whether or not, up to the time of the institution of suit in the *Myers* case, the practice of assign-

ing customs employees to regular tours of duty at night and on Sundays and holidays was in effect at seaports as well as border ports.

It has never been the practice of the Customs Service to pay or collect from parties in interest overtime compensation under the above-mentioned Act for services performed during the regular tours of duty of officers or employees. It has been the practice throughout the country to collect and pay overtime compensation only for services in addition to the 44 hours or 48 hours per week required of the officers or employees for earning their regular pay.

At all times prior to the institution of the suit in the *Myers* case, and until recently when some regular tours of duty have been established because of the war, the practice of assigning customs officers and employees to regular tours of duty at night or on Sundays or holidays for the performance of services within the purview of the above-mentioned Act was not in effect at the seaports but was limited to the ports on the Canadian and Mexican borders where, because of continuous travel, such assignments were in the public interest.

Very truly yours,

[S.] W. R. JOHNSON,
Commissioner of Customs.

U. S. GOVERNMENT PRINTING OFFICE: 1943

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

HOWARD C. MYERS

—

UNITED STATES, Petitioner,

vs.

JOHN H. ARBLE

—

UNITED STATES, Petitioner,

vs.

CHARLES C. MARTIN

—

UNITED STATES, Petitioner,

vs.

WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

ROBERT M. DRYSDALE,
Attorney for Respondents,
1538 Dime Bank Building,
Detroit, Michigan.

Interstate Brief & Record Co., Cass Bldg., 457 Fort St. W., Detroit, Mich.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

I.

CONCISE STATEMENT OF THE CASE

These suits were brought by customs inspectors at Detroit to collect extra compensation, as provided by the

administrative provisions of Sections 401, 450 and 451 of the 1930 Tariff Act (46 Stat. 708; 19 U. S. C. 1401, 1450, 1451) for services in connection with unlading of merchandise and examination of passengers' baggage arriving from Canada. The services were performed on daily tours of duty of eight hours each when assignments to such tours of duty included night, Sunday and holiday services.

Such tours of duty are referred to as "regular tours." This description is hardly accurate. They were regular only in the sense they were for a normal eight hour period. A regular tour of duty more appropriately refers to a tour of duty during the regular daylight hours when the customs house is open.

Liability is based not only on Section 5 of Act of February 13, 1911 (36 Stat. 901), as amended, as suggested on page 2 of counsel's petition, but primarily on the administrative provisions of the Tariff Act of 1922, and which were re-enacted into the 1930 Tariff Act. Said Section 5 was incorporated into both Acts by reference.

Factual Data

The only factual matters in dispute are unimportant. They relate to administrative practices claimed by petitioner to have been adopted in the payment of extra compensation when services were performed on regular tours of duty at night or on Sundays or holidays. The practices as established at Detroit are clearly set forth in the special findings of fact, numbers 5 and 6, by the Court of Claims (R. 41, 42). The principle disagreement is whether extra compensation was paid for Sunday and holiday services because it was in excess of forty-eight hours per week, or whether it was because of the fact that the services were performed on Sundays or holidays.

Plaintiff's witness, Mr. Bushey, testified that at the car ferries where extra compensation was paid for Sunday and holiday services, that such payment was made whenever the work was performed on Sundays or holidays, without reference to the number of hours of service (R. 103, XQ. 73).

Petitioner has attempted to buttress its claims respecting the administrative practice, by including in its brief a copy of a letter written lately, on June 4th, last, by the Honorable W. R. Johnson, Commissioner of Customs. The writing of such letter is, of course, not the proper way to introduce evidence into this case and the letter is not competent for that purpose. In this connection, it is not claimed by petitioner that any official regulation or rulings were ever published requiring that extra compensation be paid only for work in addition to a given number of hours per week. The practice as claimed by Mr. Johnson to have existed is in conflict with the regulations issued by the Secretary of the Treasury (*infra* p. 6).

Nature of Controversy

The controversy in the Court of Claims centered principally upon the questions of, first, whether customs officers are entitled to such extra pay without having first worked forty-four or forty-eight hours per week (depending on whether before or after effective date of Saturday half holiday law), and, second, whether the United States became liable for such extra compensation.

The reasons alleged by petitioner for the granting of the writ are reduced to the simple issue of the contention that the decision of the Court of Claims is inconsistent with the language of the statute, its legislative history and long standing administrative interpretation (Petitioner's

brief p. 10). No claim is made of any conflict with decisions of other courts. The issues involved depend exclusively upon the construction of the pertinent statute. Application for Certiorari is in effect an application for a new trial.

Each and all of the contentions of petitioner advanced in its petition were rejected by the Court of Claims. Respondents contend that the decision of the Court of Claims conforms with the plain meaning of the language used in the Act, with the regulations issued thereunder by the Secretary of the Treasury, with its legislative history, and with the construction placed upon various phases of the Act by the Courts in the cases hereinafter discussed.

Pertinent Statutory Provisions

The pertinent provisions of the Tariff Act of 1930 (46 Stat. 708; 19 U. S. C. 1401, 1450, 1451) and Section 5 of the Act of February 13, 1911, as amended by Act of February 7, 1920 (41 Stat. 402; 19 U. S. C. 267) and hereinafter referred to as the new Section 5, are as follows:

Section 401:

> (a) "The word 'vessel' includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft."
>
> (b) "The word 'vehicle' includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land; but does not include aircraft."
>
> (f) "The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian."

(g) "The word 'night' means the time from five o'clock postmeridian to eight o'clock antemeridian."

Section 450:

"No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, * * * shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the Collector * * *."

Section 451:

"Before any such special license to unlade shall be granted, the master, owner, or agent, * * * shall be required to give a bond * * * conditioned to indemnify the United States * * * and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5 * * *."

which Section 5 provides:

"That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime *(night, Sunday* or *holiday)* services by inspectors, * * * who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the unlading * * *. (For brevity the rates are omitted.) (Italics ours.)

The said extra compensation shall be paid by the master, owner, agent or consignee * * * whenever such special license or permit * * * shall be granted to the collector of customs, who shall pay

the same to the several customs officers and employees entitled thereto * * *. Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.

Provided further, that in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

Pertinent Customs Regulations

The pertinent provisions of the Customs Regulations promulgated in the 1923 Customs Regulations and carried forward into 1931 regulations and now appearing in Customs Regulations 1937, are as follows:

OVERTIME SERVICE

"Art. 1242. 'Extra compensation—(a) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading * * *, shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company.'"

"Art. 1245. Sundays and holidays—(a) for authorized services performed on Sundays and holidays between 8:00 A. M. and 5:00 P. M., customs officers and employees shall be entitled to two days pay in addition to their regular compensation."

Hours of Business and Service

Article 1461 Hours of Business—(a) This section specifies the hours during which the Customs House shall remain open for business. The hours specified are from 9:00 A.M. to 4:30 P.M. on all days except Sundays and national holidays, and Saturday afternoons, and which last provision was omitted from the prior regulations.

Article 1462 Official Hours of Service

(a) • • •

(b) "The official hours of the following employees will be: • • • inspectors to whatever duty assigned, • • •, from 8 A. M. to 5:00 P. M., 1 hour for lunch; • • •."

(c) "The above hours may be extended as the needs of the service demand, and such extension shall be without additional compensation, except as provided for in the Act of February 13, 1911, as amended by the Act of February 7, 1920."

(d) The Act of February 7, 1920, also provides (Here follows verbatim the customary working hour proviso so-called at the end of Section 5 *supra* 5.)

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III.

ARGUMENT

1.

SUMMARY OF STATUTORY PROVISIONS

The provisions of Sections 450 and 451 are clear and concise and easily understood. Certain services are described as being subject to extra compensation. They are the unlading of merchandise, baggage and passengers from any vessel or vehicle arriving from a foreign port or place. "Vehicle" is given a broad definition to include every description of carriage or other contrivance capable of being used as a means of transportation. Whenever such services are to be performed at night or on a Sunday or a holiday, a special permit is required and a bond must be filed conditioned to pay the extra compensation of the customs officers. For other services at night or on Sundays or holidays, no permit or bond is needed.

This language is used in connection with language in Section 5 reading as follows:

> "The said extra compensation shall be paid * * * whenever such license or permit * * * shall be granted * * *."

Those provisions are mandatory and no discretion is left in the collector. There is nothing there suggesting any construction as claimed by petitioner that the extra pay is to be conditioned upon the performance of 48 or 44 hours per week, or that it may not be paid for services performed on regular tours of duty at night, or on Sundays or holidays. In fact, the word "overtime" does not appear in those provisions.

Petitioner claims that it permitted all of the unlading involved in these suits to take place without a special permit or the filing of a bond, and urges that fact as one of its defenses.

Payment of extra compensation is to be made in accordance with the provisions of the new Section 5, which is Sec. 5 of the Act of 1911 (36 Stat. 901) as amended. The first four sections of the 1911 Act described the agencies of transportation to be affected by payment of extra compensation. They were described as "vessels or other conveyances" carrying cargo and arriving at a port. Those provisions were repealed in the 1922 Tariff Act and the agencies of transportation to be affected in the Tariff Act were redescribed in Sections 401 and 450 and given the broad definition heretofore noted. (*Mellon v. Minn. St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, 334 (*infra* p. 17).

The province of the new Section 5 is simply to fix the rate to be paid and to adopt the procedure necessary to accomplish the purpose specified in the Tariff Act. (*Mellon v. Minn. St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, 334), wherein the Court stated:

> "The reference to Section 5 contained in Section 451 relates merely to the manner in which the additional pay shall be computed, and by whom it shall be paid. It in no respect limits the scope of "vehicle" as used in the present Act to that of "conveyance" as used in the former Act."

The substantive rights of customs employees are created in the provisions of the Tariff Act, and the provisions of Section 5 are to be subordinated thereto and construed with reference to the language used in the Tariff Act. The applicable rule of construction, as stated by this Court in *Interstate Railway Co. v. Mass.*, 207 U. S. 79, at page 84, is as follows:

"If the document was identified, it would not matter what its own nature or affect might be, as the force given to it by reference and incorporation would be derived wholly from the charter."

When a statute is incorporated into a later statute by reference it is only the appropriate parts of the adopted statutes that are given effect. *Sutherland Stat. Construction,* 3d Ed., Vol. 2, p. 549. However, there is no conflict between the provisions of Section 5 and those of the Tariff Act. The rights conferred by Section 5 are restated with additional emphasis in the Tariff Act.

The provisions of the Tariff Act are broad enough to prohibit the appropriation of the night, Sunday and holiday hours of customs employees in connection with the designated services without payment of extra compensation. The rate of pay for those services is adopted from Section 5.

2.

SUMMARY OF REGULATIONS

It is in the foregoing quoted provisions of the Customs Regulations that the substantive rights of customs employees to extra pay is defined. There is nothing indefinite about those regulations. They represent the construction of the Secretary of the Treasury effective since the enactment of the Tariff Act of 1922 as to the conditions under which extra compensation shall be paid to customs officers. The word "overtime" is not used therein, nor is there any indication therein that extra pay is to be conditioned on prior hours of service. If such were deemed to be the fact, those regulations would certainly cover the point.

Insofar as the statute or regulations are concerned, there is no limitation to the number of hours per day or

the number of days per week which customs inspectors may be required to work. Their only protection is that they earn extra compensation when assigned to duty at night or on Sundays or a holiday.

A six day work week for customs employees has never been used as a basis for computing their daily rate of pay for the purposes of extra compensation. In accordance with T. D. 38290 (Feb. 21, 1920) their base annual pay is divided by 360. Thus, in these cases, the rate is computed by dividing $2100.00, base pay, by 360, resulting in the rate of $5.83, which rate has been used in computing the amounts herein claimed to be due.

3.

HISTORY OF PERTINENT LEGISLATION

(a) Acts of March 2, 1799, March 3, 1873 and February 13, 1911

By Sections 50 and 53 of the Act of March 2, 1799, (1 Stat. 665, 667) the unlading of cargo at night or on Sundays or the Fourth of July was prohibited except in cases or distress. Those provisions remained in force until 1873, during which period of time the importance of protecting customs officers in the enjoyment of their night, Sunday and holiday hours was paramount to the growing commerce of the United States.

By Act of March 3, 1873 (17 Stat. 579; R. S. 2871), provision was made for appropriating the services of customs officers at night for the purpose of unlading cargo from steamships arriving from foreign ports and provision was made for the payment of extra compensation for such services, and the collector was required to collect the extra compensation and distribute it to the customs employees entitled thereto.

From that time on, the pay of customs inspectors has consisted of two separate items, namely, their base pay and their extra compensation.

By Act of February 13, 1911 (36 Stat. 899), provision was first made for appropriation of the Sunday and holiday hours of customs employees for the unlading of cargo. The first four sections of the Act defined the agencies of transportation to be affected to be "vessels or other conveyances" arriving at a port. Section 5 fixed the rate of pay. It is this section, as amended in 1920, that was incorporated in the 1922 Tariff Act and later into the 1930 Tariff Act. From 1799 up to and including the passage of this Act, the word "overtime" had never been used in any legislation affecting extra compensation for night, Sunday or holiday services.

(b) Act of February 7, 1920 (41 Stat. 402; Tit. 19 U. S. C. (1940), Sec. 267)

On page 12 of petitioner's brief, the statement appears that this act was introduced at the request of the Customs Inspectors Association. This is erroneous. The bill, without the customary working hour proviso, with which it concludes, was introduced at the instance of the Treasury Department, with the approval of the United States Shipping Board and of the American Steamship Association. (Report of Committee on Commerce, Senate No. 306, 66th Cong., 1 Sess. Also, *International Railway v. Davidson*, 257 U. S. 506, pp. 512, 513.)

This Act is the new Section 5. Its congressional record clearly reveals that its principal purpose was to increase the pay of customs inspectors who admittedly were an underpaid group of Federal employees. See App. 48 showing quotations from Congressional Record. At that time customs officers received four, five and six dollars per day

for a ten-hour day (App. 50). These cases are based on $5.83 per day.

With a view of equitably distributing the increase in pay throughout the whole field force the Bureau of Customs in its "Manual for the Guidance of the Outdoor Force of the Customs Service, 1920," at page 19 of that Manual, issued the following regulations:

> "With a view to equalizing as far as practicable the extra compensation derived, assignments will be made to night work according to the rating order, exception only being made for reasons good to the assigning officers."

Also, the services for which extra compensation was to be paid were broadened to include services in connection with the unlading, receiving or examination of passengers' baggage.

In the new Section 5 appears the first use of the word "overtime" in all of this legislation. Extra compensation had been paid since 1873 without reference to that word. It was used in this Act in place of the word "night" when it became expedient to make provision for requiring the Secretary of the Treasury to fix a rate of pay for Sunday and holiday services, as well as night services. This was accomplished by deleting the word "night" and substituting the word "overtime" so as to include Sunday and holiday services as well as night services. This substitution is clearly reflected at App. 42, where the old and new Section 5 are shown together.

(c) International Railway Co. v. Davidson, 257 U. S. 506

Because of the inclusion in the new Section 5 of the provision for payment of extra compensation for services

in examination of passengers' baggage, the Secretary of the Treasury attempted to enforce the provisions of the Act at the International Bridge at Niagara Falls, and which action resulted in the case of *International Railway Company v. Davidson*, 257 U. S. 506. In that case this Court pointed out the distinction which had theretofore been maintained between the systems used in the examination of passengers' baggage and merchandise imported into the country, and also the fact that the provisions of the new Section 5 still related to the agencies of transportation described in the first four sections of the Act of 1911 and which were there described as "vessels or other conveyances" carrying cargo and arriving at a port, and held that the provision of the new Section 5 is given full effect when applied to passengers arriving on vessels, such as described in the first four sections of the Act.

(d) 1922 Tariff Act (42 Stat. 948, 954)

The opinion in the Davison case *(supra)* was handed down on January 30, 1922. The Tariff Act was approved on September 21, 1922. It was a general revision of the tariff laws which were considered to be entirely inadequate, (Rep. No. 248 on H. R. 7456, 67th Congress, 1st Session, 1922 Tariff Act, p. 1). The first four sections of the Act of 1911 were repealed, as well as all acts or parts of acts inconsistent therewith. More than 200 sections of the Revised Statutes were amended. By this Act Congress terminated the reasons assigned by this Court in the Davidson case why customs inspectors were not entitled to extra pay at the international bridge. *(Port Huron & Sarnia Ferry Co. v. Lawson*, 292 Fed. 216, p. 219; *Mellon v. Minn., St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, p 334).

(e) 71st and 75th Congress

In the 71st Congress (1930 Tariff Act) the House Ways and Means Committee reported that under existing law customs officers were entitled to extra compensation for night, Sunday and holiday services in connection with international ferries, bridges and tunnels where traffic was on a continuous twenty-four hour basis and recommended that such right be terminated. (Rep. No. 7 House of Representatives, 71st Congress, 1st Sess. to accompany H. R. 2667, p. 170). Congress did not pass the proposed amendment.

In the 75th Congress (1938 Customs Administrative Act, 52 Stat. 1082) unsuccessful efforts were made by the Treasury Department to terminate the right to collect extra compensation in connection with such traffic where customs employees were available on regular duty to perform the required services. (H. R. 8099, Rep. No. 1465, 75th Congress, 3d Sess. p. 14).

4.

LAWSON, FERGUSON AND MELLON CASES

Port Huron and Sarnia Ferry Co. v. Lawson, 292 Fed. 216.

Ferguson v. Port Huron and Sarnia Ferry Co., 13 Fed. (2d) 489.

Mellon v. Minn. St. Paul & S. S. M. Ry., 11 Fed. (2d) 332. Certiorari denied, 271 U. S. 678.

The above cases all involved construction of the extra compensation provisions of the 1922 Tariff Act.

In the Lawson case, Judge Tuttle, in the District Court for the Eastern District of Michigan, held that the Act

applied to the ferries at Port Huron, pointing out on p. 219 of the opinion, why the Davidson case was superseded by the administrative provisions of the 1922 Tariff Act.

The Ferguson case was unsuccessfully defended by the Ferry Company on the ground that extra compensation was not earned until regular hours of service had been first performed. The Government in that case took the opposite view as taken by petitioner in this case and claimed that the prior hours of service were not necessary in order to earn "overtime." The Court, on p. 492 of its opinion, pointed out that the statute gave its own definition of "overtime" and also cited the opinion of this Court in the Davidson case *(supra)*. On page 494, the Court held also that Sunday and holiday duty is in fact and in truth "overtime."

In the Mellon case, eleven great railway systems, whose services extended across the Canadian border from Maine to the Pacific coast, unsuccessfully sought to restrain the enforcement of the extra compensation provisions of the Act with respect to their railway trains crossing the international border. Much of the traffic involved was on a twenty-four hour basis and the revenue was protected by tours of duty. The Michigan Central Railway and Wabash Railway, operating three of the stations involved in this suit, were parties to that case.

On page 334 of the opinion, the Court pointed out the change made by the 1922 Tariff Act, which made the decision of this Court in the Davidson case inapplicable to the agencies of transportation described in that Act (*supra* p. 16).

On p. 15 of petitioner's brief, the Ferguson case is cited to the effect that the Court of Claims based its decision on the definition of "overtime" upon Judge Tuttle's definition in that case. This is erroneous. The Court of Claims

had little difficulty in basing its definition of "overtime" upon the provisions of the Act (R. 49, 50).

Also, on page 15 of petitioner's brief, appears the erroneous statement that the record in the Ferguson case discloses that the action was for the collection of services in addition to forty-eight hours per week. The pleadings in that case are concise and to the point and cover services at night and on Sundays and holidays, without reference to the forty-eight hours per week. The defense raised by the ferry company negatives such a statement.

The pleadings filed on behalf of the Secretary of the Treasury in the Mellon case and the statement of the questions involved in the brief filed in this Court in that case, in opposition to certiorari, clearly reflect the Treasury Department's interpretation of the Act. As stated in that brief, the action involved extra compensation for services at night, and on Sundays and holidays. There is no reference there to prior hours of service. Brief for United States, case No. 1155, Oct. term, 1925, p. 5).

5.

STATEMENTS MADE BY MEMBERS OF CONGRESS AND BY MR. BOND, NOT A MEMBER

Petitioner cites the debates on the floor of the House at the time of the passage of the new Section 5 (Petitioner's brief p. 12). It is conceded that the debates referred to were upon the subject of extra compensation for night services when in addition to regular tours of duty. However, the matter of overtime for working merely at night was not discussed. Also, the statements related only to night services and the matter of Sunday and holiday services was not even mentioned.

Petitioner also cites statements made at Committee Hearings in the 66th Congress (Act of 1920), 67th Congress (1922 Tariff Act) and 71st Congress (1930 Tariff Act). It is alleged that these statements reflected the intention of Congress with regard to the Act in question.

All such statements were made by Mr. Bond. It appears from such testimony that Mr. Bond was a customs inspector from Boston and that his organization had not held a meeting for a long time and that he had met a few of the inspectors from western ports but that the inspectors he represented were largely on the Atlantic Coast. (Hearings before the House Sub-Committee of the Committee on Ways and Means on H. R. 6577, 66th Congress, 1st Sess., p. 13.) His interest was in securing an increase in extra compensation for his constituents at the seaboard ports, and, apparently, he would not object to a discrimination by Congress against the inspectors at the Texas and Canadian borders.

Such statements are not appropriate sources of information from which to discover the meaning of the language of a statute. The reason is clearly stated in *U. S. v. Trans-Missouri Freight Association,* 166 U. S. 290, 318, from the opinion in which case, we quote:

> "There is, too, a general acquiescence in the doctrine that the debates in Congress are not appropriate sources of information from which to discover the meaning of the language of a statute passed by that body.
>
> "• • • The reason is that it is impossible to determine with certainty what construction was put upon the Act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other."

In *State v. Lancashire Fire Insurance Co.*, 66 Ark. 466, 472 (51 S. W. 633, 634), the doctrine is thus stated:

> "It is not at all true that those members who speak are the most influential, or that those who speak express the views of those who do not speak. * * *"

By attaching to the statements of Mr. Bond the importance suggested by counsel for the petitioner, is to give to Mr. Bond the right to create the supreme law of the land by making statements in Congress. Whatever problems were discussed by Mr. Bond, and others, before the Committees, were acted upon by Congress by enacting the new Section 5 and the administrative provisions of the 1922 and 1930 Tariff Acts, and it is to the plain language of those provisions to which we must needs look to determine just what Congress decided to do and did do regarding the problems discussed by Mr. Bond.

6.

MEANING OF "OVERTIME"

1. It must be admitted that if an employee works on a Sunday or a holiday, he is entitled to extra pay. Such always has been the universally accepted practice. In the pertinent legislation, Congress steadfastly protected that right for customs employees. Work on Sundays and holidays is in truth and in fact "overtime." (*Ferguson v. Port Huron and Sarnia Ferry Company*, 13 Fed. (2nd) 489, 494.) In this statute, "night" services are place on the same footing as Sunday and holiday services.

2. The phrase "remain on duty," as used in the new Section 5, was so used in connection with another new provision thereof for the purpose of correcting a prior practice of ordering customs inspectors to report for duty and then not paying them unless the unlading took place

(App. 49). The purpose of the amendment was to require payment of extra compensation when the employee had been ordered to report for duty and had remained on duty whether or not the work took place. It was so held in the *Ferguson* case *(supra)*.

3. Section 5 gives its own definition of "overtime" to be hours of service at night and on Sundays and holidays. It was so held in the *Davidson* and *Ferguson* cases *(supra)*. No further construction is permissible. The customs regulations issued by the Treasury Department *(supra)* adopt the same construction. No reference is made therein to prior hours of service. This construction was followed out in the *Mellon* case *(supra)*.

5. The word "overtime" was substituted for the word "night" in the new Section 5 when it became necessary to refer to Sunday and holiday services as well as night services, and, as used in the Act, means that night, Sunday and holiday services shall be compensated as overtime.

6. Respondents' construction conforms with the history of the Act and its purposes which were to facilitate lading and unlading at night and on Sundays and holidays and to increase the pay of customs employees by increasing their extra compensation for such services. Petitioner's construction would tend to defeat those purposes.

7. In the controlling provisions of the Tariff Act, payment of extra compensation is required to be made when the designated services are performed at night or on a Sunday or a holiday, and no reference is made to prior hours of service.

7.

CUSTOMARY WORKING HOUR PROVISO

The construction of the "working hour proviso" so-called, at the end of Section 5, as contended by petitioner, is specifically prohibited by the language of the proviso.

The proviso was added as an amendment to the proposed new Section 5 on the floor of the House in Committee of the Whole House at the time of the passage of the Act. In the appendix, pp. 44 to 48, we show from the Congressional Record, the history of this proviso, from which it conclusively appears that it was offered by Representative Dupre, of New Orleans, for the purpose of conforming the customs house hours of that port to the hours customarily worked by longshoremen, which were from 7 A.M. to 4 P.M., and whose services were necessary in unlading.

Inasmuch as the new Section 5 related only to the agencies of transportation described in the four sections of the Act of 1911, as pointed out by this Court in the *Davidson* case *(supra)*, it could not have been meant to relate to such continuous service as that at the international bridge at Niagara Falls.

Petitioner's contentions are predicated upon the theory that the regular working day of customs employees at Detroit is twenty-four hours, including Sundays and holidays. Such construction violates the definition given to the words "day" and "night" in Section 401 of the Tariff Act. When the new Section 5 was incorporated into the Tariff Act, the definition of "day" given in the Tariff Act would control the meaning of "day" as used in this proviso. It is specifically defined as the period from 8:00 A.M. to 5:00 P.M., and which is a period of nine hours.

In the Congressional Record *(supra)* it appears that Mr. Dupre purposely protected the extra compensation of customs employees from just such a construction as placed upon this proviso by the respondent, by placing a protecting clause therein. The protecting clause in this proviso is two-fold:

1st. One mandate of this protecting clause is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter *the length of a working day* for customs employees. * * *" (Italics ours.)

2nd. The other mandate of the protecting clause is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter * * * *the overtime pay herein fixed.*" (Italics ours.)

The length of a working day for customs employees, which cannot be "altered or affected" by the Collector, is fixed definitely in the enacting clause of Section 5 at nine hours, and might be referred to as the usual daytime hours. It is there referred to as the hours from 8:00 A.M. to 5 P.M. It is this nine hour period which cannot be affected or altered by the collector. He is vested with discretion to shift this nine hour period so as to conform with the customary hours of other employees of a port whose services are necessary in the unlading.

Likewise, the "overtime herein fixed" and which is not to be "altered or affected" by the collector is fixed in the enacting clause of the statute as extra compensation for services to be performed on Sundays and holidays and during a fifteen hour night period. There is no other "overtime" pay fixed in the statute.

Provisos limiting the effect of the general enacting clause should be strictly construed so that no case should

be taken out of the enacting clause which does not fall fairly within the terms of the proviso. (*Lewis Sutherland, Stat. Constr.*, Vol. 2, 2d ed., p. 674; *U. S. v. Dickson*, 15 Peters, 141, p. 165.)

By the collector's alleged right to regulate "hours," the collector at Detroit has made a vast number of regulations partially enumerated as follows and which are reflected in finding No. 6 (R. 42):

1. To differentiate between the vehicular ferries and car ferries, by relieving the one from the obligations of extra compensation, and requiring the other to pay.
2. To require payment of extra compensation at the passenger station of the Michigan Central Railroad, and to relieve the freight station of the same company from such payment.
3. To eliminate competition between vehicular ferries on the one side, and the Ambassador Bridge, Detroit & Canada Tunnel on the other side.
4. To eliminate competition between the freight service of Michigan Central Railway as against that of Grand Trunk Railway, Wabash Railway and Pere Marquette Railway.
5. To "alter and affect" the payment of extra compensation at any or all of the stations at Detroit involved in this suit.

It is perfectly obvious that no such vast powers were intended to be, or were given to the collector under that proviso.

8.

LIABILITY OF GOVERNMENT

It is claimed that the United States does not become liable unless an application is made for a permit and a bond filed. Such a construction not only violates the terms of the act, but it gives one officer of the Government the power to deprive another employee of the Government the pay provided by Congress, by simply neglecting or refusing to comply with the law. Such a result is illegal. *Geddes v. U. S.*, 38 C. Cls. 428, 442.

The customs inspectors are employees of the Government. Their pay is fixed by Act of Congress. There is no contractual relation between the inspectors and the transportation companies, importers or passengers. The inspectors must needs look only to their employers for pay. They have no right of action against anyone except the United States.

They have nothing whatever to do with the collection of the funds for which the transportation companies and others become liable. The collection of such funds is entirely out of their control. The Acts of Congress forbid a government official or employee from receiving pay for his services from a private source. (Act of March 3, 1917; Chapter 163, Sect. 1; 39 Stat. at L. 1106.) Customs officials were especially forbidden to receive such payment. (Rec. Stat. Sect. 1790; 49 Stat. 864.)

The Government has assumed the work of collection of these funds with which to pay extra compensation by requiring the collector to demand a bond from the agencies of transportation receiving the benefits of such services and to collect for such services when rendered by the customs officers and employees. There is nothing

in the statute in any manner making the right of the employee to his pay dependent upon collection of extra compensation from the carriers or others.

There is no doubt but that it was part of the plan that the agencies of transportation should pay for these services. All that was necessary to carry out the plan was for the agents of the Government to enforce the provisions of the Act. But no less a part of it, and in fact the most important purpose of this legislation, was to facilitate lading and unlading at night and on Sundays and holidays and to provide extra compensation for the customs employees to stimulate their interest in those services.

From a practical standpoint, this problem of who should pay for these services was solved by Congress in the only legal manner possible. The only manner by which the plan could be carried out legally was for the Government to assume the obligations of payment to customs employees, and to reimburse itself from the agencies of transportation involved, and this is just exactly what it did accomplish.

Payment necessarily had to be made by the Government through the Collector, and the extra compensation to the inspectors had to come out of the funds of the Government and the Government became liable for the extra compensation. The failure by the Government to collect from the agencies of transportation did not relieve it from the liability for the payment of the extra compensation.

9.

ADMINISTRATIVE CONSTRUCTION

Petitioner lays great stress upon the construction alleged to have been given the Act by the Collector of Customs, notwithstanding no opinion or regulation in accord-

ance with the alleged practices was ever officially promulgated. Respondents contend that the practices relied upon were out of harmony with the statute and not in accordance with the regulations officially issued by the Secretary of the Treasury.

But had any regulation been issued authorizing such practices, the regulations would be a nullity. The doctrine is well established that any rule or regulation of an administrative body out of harmony with the statute upon which it is based, is a nullity.

Any uniform construction of the pertinent act by the Bureau of Customs is entitled to great respect, but that doctrine has its limitations. If such construction is not in conformity with the provisions of the law it should be struck down. The case at bar is controlled by the cases of—

U. S. v. Dixon, 15 Peters, U. S. 141, 161 and
Koshland v. Helvering, 298 U. S. 441, 446, 447.

In the Dixon case the uniform construction of an Act of Congress made by the Treasury Department over a period of years from 1818 to 1834, was struck down as not in conformity with the act upon which it was based.

In the Koshland case a regulation issued by the Treasury Department under the 1921 Revenue Act, although of long standing and universally acted upon, was struck down because the regulation was not justified under the statute.

In Note 13 on page 15 of petitioner's brief, 2 Comp. Gen. 512 (1923) is cited in support of the allegation of the alleged administrative construction of the Act presumably on the theory that in the case so cited extra compensation was denied on the ground that prior hours had not been worked by the inspector. That decision has no

reference whatsoever to overtime. The services there involved were for guard duty to prevent landing of liquor from a boat in port for the purpose of coaling. Extra compensation is not earned by guard duty, regardless of the time involved.

If, as it seems possible, the decision in that case was used as a precedent by the Collector of Customs in his refusal to pay overtime for services, such as herein involved, then it becomes easy to see why such an unlawful practice may have put into effect.

10.

COMPLAINTS AS TO AMOUNTS INVOLVED

Petitioner complains that the amounts to be recovered by respondents are excessive. A complete answer to that argument is the fact that the rates of pay were fixed by Congress. Because of the unlawful administration of the Act by the collector, it is probable that some customs officers have been deprived of the increase in their pay which Congress provided, while others have received more than contemplated. This inequity results from the assignment of more night, Sunday and holiday services to certain inspectors than to others.

However, that is not a matter for the Courts. If the Bureau of Customs considers the Act to be inequitable, then its remedy is by redress in Congress and not by way of attempting to change the plain meaning of the act by practices out of harmony therewith.

Most of the customs services are performed during the usual daylight period of eight hours on week days although during certain seasons the traffic becomes heavy at some international bridges on Sundays and holidays. The num-

ber of tours of duty performed during the regular weekly daylight hours far exceeds the number of hours performed at night and on Sundays and holidays.

By spreading the assignments of tours of duty at night and on Sundays and holidays in an equitable manner throughout the whole force, a reasonable raise in pay for all inspectors would result.

11.

COMPARISON WITH OTHER LABOR ACTS

In Note 16, page 17 of petitioner's brief, reference is made to the Fair Labor Standards Act and Walsh-Healey Public Contract Act under which one and one-half times the base pay is fixed for overtime, and with the inference that the rate fixed by Congress in the pertinent statute is unreasonable. A comparison however of the results accomplished by those two acts, with the rates fixed in the Customs Act, reveal that were respondents working under the provisions of either of those acts they would have received slightly more for working at time and one-half on Sunday than is provided for customs officers in the pertinent act.

Those Acts are based upon a forty-hour week and under them respondents' daily rate of pay would then be computed by multiplying 52 by 5 (representing 5 days per week), giving 260, and dividing the base pay of $2100.00 by 260, giving a daily rate of $8.08. 1½ times $8.08 equals $12.12 extra pay, which would be paid customs officers under either of those two acts, for working on Sunday.

Customs officer's base pay in these cases is computed by dividing $2100.00 by 360 giving a daily rate of $5.83. By working eight hours on Sunday or at night, they become under the pertinent statute entitled to two days additional pay, or $11.66.

12.

PETITIONER'S CLAIM OF SET-OFF

It is clear that this extra compensation is in addition to the regular pay of these officers. The base pay of plaintiffs is fixed by Statute from which we quote:

> "The following annual rates of compensation are hereby established for the employees in the customs service hereinafter specified:
>
> (e) Inspectors, $2100 * * *."
>
> (U. S. C. A. title 19, Sec. 6 (a)—Act December 12, 1930, C. 10, 36 Stat. 1026.)

Under Section 5 it is specifically stated that the extra compensation shall be "additional pay."

Article 1242 (e) of Customs Regulations of 1937—provides for extra compensation as follows:

> "The extra compensation for overtime services *is in addition to the regular compensation paid by the government* in the case of officers and employees whose compensation is fixed on the ordinary *per diem* basis and those receiving a compensation per month or per annum." (Italics ours.)

Respondents earned their base pay by serving the tours of duty assigned to them. If their tours of duty happened to be at night, or on a Sunday or a holiday, they became entitled also to extra compensation fixed by the statute and customs regulations.

If the collector had the authority to "dock" them for usual hours not worked by them, then their superiors could prevent them from earning any salary at all, or could reduce the amount of their salary provided by statute, by adopting the expedient of not assigning them to duty.

Neither the collector nor any of the superior officers of these men have any authority whatsoever to reduce or interfere in any manner with the base pay of these men as provided by statute, just so long as they serve when and where directed. *Geddes v. U. S.*, 38 C. Cls. 428, 442.

13.

SPECIAL CONSIDERATION OF THE AMBASSADOR BRIDGE AND DETROIT AND CANADA TUNNEL

Counsel for petitioner suggest that the Davidson case *(supra)* still applies to traffic over the Ambassador Bridge and the Detroit and Canada Tunnel notwithstanding the broad definition given to "vehicle" in the Tariff Act and the mandatory provisions of Sections 450 and 451.

Plaintiffs contend that both the tunnel and the bridge come within the definition of vehicle as defined in the act and that each is a "carriage or other contrivance used, or capable of being used, as a means of transportation on land" and as such the owners or agents of those facilities are required to file a bond as required by Section 451 of the act.

Black's Law Dictionary gives the common definition of a bridge to be "a structure erected over a stream * * * to facilitate the passage thereof." In Volume 4 of R. C. L. at page 193, the following definition appears, "A bridge has been defined to be a structure * * * erected over a river * * * for the more convenient passage of persons and beasts and *for the transportation of baggage.*" (Italics ours.)

It is a means of passing from one bank to the other and so becomes a contrivance used as a means of transportation. It is a means used in transporting traffic from

one bank to the other. Likewise, the tunnel in this case is a means used for transporting traffic under the stream.

There is no difference between a ferry, a bridge or a tunnel as a means of conveyance of persons, baggage or freight from one side of the river to the other. All accomplish the same purpose. Protection of the revenue at the bridge and tunnel was just as necessary as at the ferries.

Furthermore, the bond is required from the "master owner or *agent*" (italics ours) of such vessel or vehicle. When the operators of such bridges and tunnels accept fares from patrons for the use of their facilities, they became agents of such patrons for the purpose of furnishing a means of safe transportation to the opposite short. They become more than mere licensees. The bridge company assumes an obligation for furnishing a means of safe passage. That liability continues until the patron leaves the bridge.

> "An agency may be defined as a contract either express or implied * * * by which one of the parties confides to the other the management of some business to be transacted * * * on his account * * *." (*2 Amer. Juris.*, Sect. 1, p. 12.)

The relationship is one of principal and agent to the same extent as in the case of the railway company and its passengers. This interpretation conforms to the meaning attached to the word "agent" by Customs Regulations which provide that the "transportation company" file the bond. (Article 1242(a)-1937, *supra* p. 6.) There can be no question but that the bridge company and tunnel company, respectively, are transportation companies within the meaning of that regulation.

14.

REASONS ALLEGED BY PETITIONER FOR THE GRANTING OF THE WRIT—AUTHORITIES ON STATUTORY CONSTRUCTION

The reasons alleged by petitioner for the granting of the writ are not well founded because the decision of the Court of Claims conforms to the language, purpose and legislative history of the Act. The language of the statute is clear, concise and easily understood. There is no ambiguity in the wording of the statute. It construes itself, leaving no occasion to resort to extrinsic aids for its construction. There is no other result that could have been reasonably reached by the Court of Claims.

The construction of this statute falls within the doctrine expressed in the following authorities:

Lewis Satherland Statutory Construction, 2d Edition, Section 367, p. 702.

> "'When the intention of the legislature is so apparent from the face of a statute that there can be no question as to the meaning, there is no room for construction.'
>
> "It is not allowable to interpret what has no need of interpretation."
>
> "There is no safer or better settled canon of interpretation than that when language is clear and unambiguous it must be held to mean what it plainly expresses. These views of eminent courts are supported by numerous cases. When the meaning of a statute is clear, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by the legislature and not by judicial construction."

And again in the same volume in Section 348, p. 665, the same principle is expressed as follows:

> "The statute itself furnishes the best means of its own exposition; and if the intent of the act can be clearly ascertained from a reading of its provisions, and all its parts may be brought into harmony therewith, that intent will prevail without resorting to other aids for construction."
>
> "Where the words * * * admit of two interpretations * * * the construction ought to be favorable to the claims of the officer who performs the duties * * *" *(United States v. Morse,* 3 Story 87).

To the same effect, see

59 Corpus Juris, 952;
Lake County v. Rollins, 130 U. S. 662, 670.

In the latter case, it is said:

> "to get at the thought or meaning expressed in a statute, a contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning which involves no absurdity, nor any contradiction of other parts of the instrument, then that meaning, apparent on the face of the instrument, must be accepted, and neither the courts nor the legislature have the right to add to it or take from it."

United States v. Beaver Run Coal Company, 99 Fed. 2d 610, 613.

> "It is a well established doctrine that a clear, unambiguous statute must be literally construed. *Hamilton v. Rathbone,* 175 U. S. 414, 20 S. Ct. 155, 44 L. Ed. 219; *Thompson v. United States,* 246

U. S. 547, 38 S. Ct. 349, 62 L. Ed. 876; *Crooks v. Harrelson*, 282 U. S. 55, 51 S. Ct. 49, 75 L. Ed. 156, *Helvering v. New York Trust Company*, 292 U. S. 455, 54 S. Ct. 806, 78 L. Ed. 1361. * * *"

Certainly there is nothing extraordinary in following the universal custom of requiring extra compensation to be paid for services on Sundays and holidays nor in placing night services in the same category. Especially is this true when the history of the statute under consideration clearly shows a fixed determination over a period of one hundred and twenty-one years to protect the employee in his right to night, Sunday and holiday time.

A construction of the Act as contended by petitioner necessitates reading something into the Act not expressed therein. To uphold its contentions would constitute an exercise of judicial legislation which the courts have neither the right nor the power to indulge, and would require a holding that although Congress had employed plain, positive and easily understood language to express its intention, it had in reality intended something different which it did not express.

15.

NO PUBLIC INTEREST IN MATTERS INVOLVED

Respondents deny the public importance alleged by petitioner to exist with respect to the matters involved. The statute relates only to a small body of government employees. It is not a statute of general applicability. Furthermore, the points in dispute relate only to a small percentage of this small group. It is only those employees working on tours of duty at night or on Sundays or holidays that are involved, and all of those employees are located at contiguous border ports as distinguished from

seaboard and interior ports. They comprise only a small part of the total number of customs employees.

The Mr. Bond cited by petitioner, in "Hearings before a sub-committee on Ways and Means, House of Representatives, H. R. 6577, in the 66th Congress, on page 14, estimated that the number of customs inspectors in the United States to be about 1,000, and that 700 of that number were in naval and other seaboard ports. According to that estimate, about 300 customs inspectors were employed at ports other than the seaboard ports. Of that number, some are assigned to interior ports and are not affected. A liberal estimate, after making allowance for any increase in the force since Mr. Bond testified, would be three hundred customs employees to be affected by these suits.

(a) Immigration Act

Petitioner cites the similarity of the Immigration Act (Act of March 2, 1931, c. 368, 46 Stat. 1467 (8 U. S. C. 109(a)) to Section 5 of the statute here involved as a reason why review should be granted. But it is not clear that a decision in this case would be authoritative on the construction of the Immigration Act.

Furthermore, even if the decision here would be controlling in the Immigration Act, there still would be no matter of general public interest involved. Immigration inspectors and customs inspectors are substantially equal in number and only those immigration inspectors would be affected who are assigned to tours of duty at night and on Sundays and holidays at the contiguous border ports. The number of employees to be affected would be substantially the same as the number involved in this litigation.

(b) Other Government Services Alleged to be Affected

The shipping commissioners and their deputies alleged to be affected would in no way be involved by a decision in this case for the reason that their duties do not require assignments to tours of duty outside of the regular daytime working hours. With respect to them, there is no traffic involved as with customs inspectors requiring continuous service.

The same situation exists with respect to inspectors of the engineering department of Federal Communications Commission. The nature of the duties performed by such inspectors do not require assignments to duty at night, or on Sundays or holidays, such as are required of customs officers.

The lack of the public importance involved in the two last named acts is illustrated by the small number of overtime hours involved with respect to the services of radio inspectors. With respect to them, the number of overtime hours of service involved for a period of six months from July 1, 1939, to December 31, 1939, was 633 hours (Report No. 2831, House of Representatives, 76th Congress, 3d Sess. on H. R. 10205) on the subject of overtime compensation for radio inspectors.

(c) Alleged Importance With Respect to Sums of Money Involved

Counsel for petitioner have cited the figure of $8,000,000.00 to be involved in customs officers litigation. There is no substantiation of this estimate. Most of the claims that will be presented are already in suit. An estimation of $2,000,000.00 to $2,500,000.00 is ample to cover the total claims already filed and to be presented.

In this connection, it is pertinent to suggest to the Court that in accordance with the decision of the Court of Claims, the Bureau of Customs has been violating the overtime provisions of the Act for over twenty years. In 1920 Customs officers pay was $4.00, $5.00 and $6.00 per day (*supra* 50). The pay in these cases is computed on the basis of $5.83 per day.

These employees have been obliged to await the strength of united action in order to bring suit against their employer for what is their lawful due. The larger the amount that has been kept from them in violation of the Acts of Congress, the more necessary it should be that this compensation be paid to them as quickly as possible. The redress should be swift and certain.

In view of these circumstances, we respectfully suggest that the Court should not be industrious in continuing this litigation and thereby increasing the heavy burden already assumed by these employees and which they can ill afford.

16.

THOROUGH CONSIDERATION GIVEN BY COURT OF CLAIMS

It appears that these cases were twice argued before the Court of Claims (R. 1): That as a result of the first argument, the court filed findings of fact and conclusions of law on January 6, 1941, holding plaintiffs entitled to recover and that entry of judgment was suspended to await the filing of a stipulation of the amounts due or the taking of proofs thereof, with opinion by Chief Justice Whaley (92 Ct. Cls. 447), and that the usual motion for a new trial was made and denied.

That on October 6, 1941, a motion for entry of judgment for the plaintiffs was argued and submitted by counsel for

petitioner, and opposed by the United States, and that on October 17, 1941, the Court on its own motion filed an order withdrawing the former findings, conclusions of law and opinion and remanded the cases for further argument *ab initio*.

Although the reasons for this are not clearly apparent from the record, the facts in connection therewith are of such a nature that we deem this Court may take notice thereof.

Judge Whitaker has disqualified himself from participation in these cases, he having filed the first brief in the Court of Claims in this case on behalf of the United States before his elevation to the Bench. At the first hearing, three Judges only participated—Judge Williams at that time being sick. The first opinion filed was the unanimous opinion of the three Judges participating.

By the time motion for entry of judgments based on the first opinion came on for argument, one of the three judges so participating had retired and Judge Williams had died, and only two Judges were then sitting who had participated in the first argument. We believe that the order setting aside the first opinion and findings of fact and conclusions of law was entered because of the laudable desire of the Court to permit the new Judges to participate and to safeguard against possibility of error.

It appears, therefore, that this case has been twice argued before the Court of Claims and has received the utmost consideration and that every Judge participating, except Judge Madden, has concurred in the opinion of the Court and that Judge Madden has concurred in such opinion in all matters except as to the application of the extra compensation provisions of the Act to the facilities of the Ambassador Bridge and Detroit and Canada Tunnel.

IV.

CONCLUSION

Respondents respectfully submit that a Writ of *Certiorari* should be denied in this case because:

(1) There is no merit to petitioner's several contentions and in a well considered opinion, the Court of Claims has decided correctly issues of no general applicability; and affecting only a limited number of a small group of federal employees.

(2) Because the pertinent statute has been construed correctly by the Court of Claims and petitioner has failed to show any probability of error in the decision of that court.

Respectfully submitted,

ROBERT M. DRYSDALE,
Attorney for Respondents.

August, 1943.

APPENDIX

OLD AND NEW SECTION 5 SHOWN TOGETHER

The phrases omitted from old Section 5 are bracketed and are in small capitals. The new phrases are in *italics*. That part of the section which remained is in ordinary type.

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [NIGHT] *overtime* services of inspectors, storekeepers, weighers, and other customs officers and employees *who may be required to remain on duty between the hours of five o'clock post-meridian and eight o'clock ante-meridian, or on Sundays or holidays, to perform services* in connection with with the lading or unlading of cargo [AT NIGHT], or the lading [AT NIGHT] of cargo or merchandise for transportation in bond or for exportation in bond or for [THE] exportation with benefit of drawback, *or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage* [BUT SUCH RATE OF COMPENSATION SHALL NOT EXCEED AN AMOUNT EQUAL TO DOUBLE THE RATE OF COMPENSATION ALLOWED TO EACH SUCH OFFICER OR EMPLOYEE FOR LIKE SERVICES RENDERED BY DAY], *such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty.* [,] The said extra compensation *shall* [TO] be paid by the master, owner, agent, or consignee of such vessel or other

conveyance wherever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.* Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent or consignee of such vessel[s]: *Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.*"

REGARDING CUSTOMARY WORKING HOURS

Congressional Record, Vol. 59, Part 2,
66th Congress, Jan. 28, 1920

(Proceedings House of Representatives)

(Pages 2172 and 2173)

"Mr. Dupre: Mr. Chairman, I intend to offer the following amendment, and I might as well discuss it now. I will ask the Clerk to read the amendment.

The Clerk read as follows:

> 'Amendment offered by Mr. Dupre: Page 3, line 10, strike out the quotation marks, insert a colon and the following:
>
> Provided further, That in those ports where customary working hours are other than those hereinabove mentioned the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.'

Mr. Dupre: * * * The amendment is offered simply to meet the situation that exists in my home city of New Orleans and possibly in other ports of the country. The bill as drawn provides for overtime pay between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian, proceeding on the theory that working hours begin in all ports at 8 o'clock in the morning and end at 5, with an hour for lunch. It happens that in the city of New Orleans conditions are different, as was set forth in a telegram received by me from the agent of the New Orleans Steam-

ship Association, which will explain exactly what the situation is there. I will ask the Clerk to read the telegram.

The Chairman: Without objection, the Clerk will read the telegram in the time of the gentleman.

The Clerk read as follows:

New Orleans, La., January 27, 1920.

Hon. H. Garland Dupre,
House of Representatives,
Washington, D. C.:

We understand that Senate bill 3418 passed the Senate December 16, has been reported favorably, and this bill fixes rate of overtime compensation and hours in reference to customhouse officers and employees, etc. The regular day hours of longshoremen at New Orleans are from 7 in the morning to 4 in the afternoon, with meal hour from 12 to 1, while the bill in question provides hours of customs employees from 8 in the morning to 5 in the afternoon, so that there will result much confusion and unnecessary expense. Therefore the New Orleans Steamship Association request that you will use your influence toward having inserted in this bill a clause providing that in those ports or in those industries where the customary hours are from 7 in the morning to 4 in the afternoon authority be vested in the collector of customs to regulate the hours of customs employees to agree with prevailing customary hours in those ports or industries. We would appreciate your giving this matter your earnest attention.

S. T. Demilt.

Mr. Dupre: In accordance with that request and in accordance with the condition that exists in New Orleans, I have offered the amendment, which is entirely permis-

sive. It leaves with the collector of customs the authority to regulate the hours of customs employees so as to agree with the prevailing working hours in those ports; but I have safeguarded the eight-hour day which this bill provides for, and I have safeguarded the provision for overtime by adding the words—

> But nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

I have submitted that amendment to the two majority members of the subcommittee of the Ways and Means Committee who considered the bill, the gentleman from Massachusetts (Mr. Treadway) and the gentleman from Connecticut (Mr. Tilson), and they think the amendment is entirely unobjectionable, saying that the conditions referred to had not been drawn to the attention of the committee.

Gentlemen here will realize what would happen if longshoremen, who have a way of their own about many things, decided to go to work at 7 o'clock and work until 4, and under the law the customhouse employees, who should work concomitantly with the longshoremen, could not get any overtime pay until between the hours of 5 P.M. and 8 the next morning. There would be a hiatus between 4 o'clock when the longshoremen stopped work and 5 o'clock when the customhouse employees would begin to get their overtime, naturally the later would not want to work in the interim. The result would be very unfortunate, and this merely allows the collector of customs to say that those two bodies of men, both of whom are essential to unloading and loading the ship, may be allowed to work at the same time. It is not mandatory in any way, but merely discretionary with the collector.

A similar telegram has been received by my colleague Mr. O'Connor, of Louisiana, who is here in the chamber, and who shares with me the views expressed by me both as to this bill and to the amendment proposed."

* * * * *

(Pages 2177 and 2178)

"Mr. Dupre: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.

* * * * *

Mr. Dupre: * * * The bill in question, in providing for overtime pay, fixes the same between 5 o'clock p. m. and 8 o'clock a. m. It happens that in the city of New Orleans the working hours of the longshoremen are from 7 a. m. to 4 p. m., and in order that there shall be no conflict between this bill and the working hours of the laboring men of that city, and possibly in other ports, this proviso simply authorizes the collector of customs to adjust the hours of the customhouse employees with those of the prevailing working hours in that city. In other words, if the men begin their work at 7 o'clock and work until 4, the collector of customs can provide that the overtime shall be from 4 p. m. until 7 the next morning instead of from 5 p. m. until 8 o'clock the next morning. It is entirely permissive. If the collector of customs sees any reason why it should not be done, it is within his authority not to do it, and I have safeguarded absolutely any possibility of lengthening the working day to more than eight hours provided by the bill or interfering with the overtime charge in any way.

Mr. Treadway: As I understand it, it is simply to conform the hours in the lading and unlading of vessels and the customhouse hours at that port.

Mr. Dupre: Entirely; and at other ports, for aught I know. I trust the gentleman from Ohio has enjoyed my explanation of the matter."

REGARDING INTENTION TO INCREASE PAY OF CUSTOMS EMPLOYEES

(Congressional Record coninued)

(Page 2171)

"Lading or unlading of vessels at night.

Mr. Treadway: Mr. Speaker, by direction of the Committee on Ways and Means I call up the bill S.3418.

The Speaker: The gentleman from Massachusetts, by direction of the Committee on Ways and Means, calls up a bill, which the Clerk will report.

The Clerk read as follows:

> 'An Act (S. 3418) to amend an act entitled "An act to provide for the lading and unlading of vessels at night, the preliminary entry of vessels, and for other purposes, approved February 13, 1911."'

* * * * *

"Mr. Treadway: Mr. Chairman, the bill before the committee, S.3418, has to do with the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes. It is an amendment of the original act of February 13, 1911. * * * Therefore this amendment will reduce the hours of labor from 10 to 8. It also puts into effect as law the method of payment for overtime, rather than having the payment for overtime regulated by customs regulations. It establishes as law, in other words, the system for payment of overtime. It also permits all men

who are ordered to report for lading or unlading of vessels to be paid, when ordered to report, for overtime. It seems that through a regulation of the customs department if these inspectors have been ordered to appear for work and for any reason a vessel was not there for them to go to work on they did not receive pay for that time. That seems entirely unfair. It is not the fault of the inspectors that the vessels are not there. It is not a fault of theirs that they are not working rather than waiting to work. Therefore there is this further provision whereby payment will be made to the men if ordered to report for overtime work.

• • • I might add that phrases appear in the bill showing that this payment is made by the steamship company reimbursing the Government for the amount paid. *The pay of these inspectors has been very low. The rates of pay are $4, $5 and $6 per day for a 10 hour day.* I think the members of the committee will agree with me that while we retain that same rate of pay we ought to be willing to pay these men for overtime on a basis of an 8 hour day rather than on the basis of a 10 hour day."

• • • • •

Mr. Husted: I understood that the customs inspectors were very much underpaid.

Mr. Treadway: I think there is no question about that.

Mr. Husted: I would like to ask the gentleman if he thinks there would be sufficient overtime work to give these men adequate compensation under the provision for overtime in this bill?

Mr. Treadway: I will state to the gentleman that the department, as I am informed, is taking up the rescheduling of all customs employees, and pending that official report to the Secretary of the Treasury, or whoever may be making the investigation, this method is

agreeable both to the department and to the men; and I might add, there is sure to be much more overtime on the basis of 8 hours than if the men were working 10 hours.

Mr. Husted: There is, then, a reasonable prospect that by some future legislation the compensation of these men will be increased?'''

* * * * * *

(Page 2172)

"There has been submitted to a Member of the other branch, who was particularly interested in this bill, an opinion from the collector of the port of New York, where of course the larger number of these men are employed. I wish to read, Mr. Chairman, just a short extract from that letter. I read:

> 'On behalf of the underpaid customs employees of this port I want to express grateful appreciation of your successful efforts in putting through the Senate bill 3418, which provides, among other things, for compensation for the customs inspectors employed on baggage duty for their services at night and on holidays. This will place them on an equal footing with inspectors who are employed on cargo and who now receive from the steamship companies compensation for night work.'

Then the collector goes on to say that fundamentally he does not believe in the Government being reimbursed for Government work by steamship companies, but that has not directly to do with this case. He says further:

> 'I am sure if you knew as definitely as I know the distressing conditions among the Government's employees in this port, you would realize more

fully perhaps why we are grateful to you for this effort in our behalf. When you realize that with the exception of a bonus of $240 per annum to all Federal employees receiving up to and including $2,500, these men are getting practically the same scale of wages given them a quarter of a century ago, you will understand, I am sure, why I have profound admiration for their patience and their patriotism in sticking to their jobs.

As a matter of fact, we are rapidly losing our most efficient men. Resignations are coming to me daily, and the force is now materially reduced beyond where it was prior to the war. The merchants' association and other civic organizations in New York have interested themselves in the situation, and will soon make an appeal to Congress to take some steps in the direction of safeguarding the interests of importers and exporters in this port by way of strengthening the customs machinery here.

At all angles our Federal employees see a most prodigal display of unprecedented wealth. Meanwhile they are harassed with the consciousness that in many instances at home their children are suffering for the want of proper food and clothing. They know that ours is the richest Government in the history of the world, and they are wondering why then, the servants of this most wealthy Government, must go on in poverty."

The letter is signed by Byron H. Newton, collector. I think that is very strong evidence in behalf of the legislation called for by this bill from a man of experience in the very line of coming in contact with these men who are working for a very meagre stipend, needing to be men of good appearance, gentlemen in their conduct toward the passengers with whom they come in contact, and recognizing that the service must become impaired unless a means can be found, as is furnished by this bill, to increase the pay of the men."

(Page 2173)

"Mr. Benson: Mr. Chairman, the purport of the bill has been called to my attention by a number of men working in Baltimore. I happen to be familiar with the work these men are doing, and this bill meets a much needed reform. At one time these men were allowed to collect extra pay from the shipper, but now under some regulation that is prevented.

They are really the most underpaid for men of their ability and fidelity of men in the Government service."

* * * * *

"Mr. McCrate: Mr. Chairman, in New York City we have a great many of these men employed in the Customs Service, and during the war an attempt was made to get them to leave the service. You can understand that men familiar with the shipping business during the war could receive much larger remuneration outside of the service than inside; and yet, notwithstanding the temptation, the greater portion of the customs employees and inspectors stayed and maintained their relationship with the Government.

I know many men, working there nights and Sundays and then having to report early Monday morning, stayed there and performed their duties notwithstanding these tempting offers from outside.

Yesterday something was said by a gentleman in the House that it seemed strange, in view of the complaints as to the low salaries of employees, that they should want to hang on to the Federal pay roll. As a matter of fact, I always give advice to young men and women who seek service on the Federal pay roll not to do it. The

best thing they can do is to seek employment outside; but once they get attached to the Federal service it then becomes a question, after leaving that service, where they will get similar employment. I believe the Federal Government is not helped by suggestions that young men and women should leave its service, but we should attempt to give them adequate compensation for the services they render to the Government.

In our own city of New York I know that the letter carriers and postal clerks and other Government employees are receiving much less than the wages paid to unskilled labor. The temptation for men and women in Federal employ to quit the service is much greater than most people realize, and I am certain that Members of Congress do not desire to encourage them to do that, but desire rather to hold efficient employees by adequate compensation. (Applause.)"

(Page 2175)

"Mr. Briggs: Mr. Chairman and gentlemen of the committee, I am very much in favor of the bill pending before the committee. It seems to me that the Government has been waiting rather a long time to grant some relief to these men who have been so patient and faithful for so long without such relief. A great number of these customs employees and other employees covered by this bill are employed along the dock fronts in the customs service in the great ports throughout this country, and many of them at the ports in my district—the ports of Galveston and of Texas City. Those men work at all times and in all weathers, and they do not complain. They can not stand the burden and pressing costs of the high increase in living without some relief, however. *This bill undertakes to put into force and effect by law* regu-

lations that the Government, through the Treasury Department, has already sought to establish almost to the same degree. The bill carries a little greater compensation, as I understand it, than now obtained, compensation that is absolutely needed."

* * * * *

(Page 2176)

"Mr. Tilson: It seemed to the subcommittee that, taking the regulations which have prevailed for many years, and taking the very low compensation which these men receive per day, the schedule as fixed in this bill is not more than fair for them."

(Page 2177)

"Mr. Goldfogle: Mr. Chairman, I rise to express my hearty approval of this measure. The force of customs inspectors and other customs officers covered by this bill have been and are, in my opinion, much underpaid. They render faithful and arduous service. During the winter months their work is particularly exacting and hard. They are an intelligent set of officials, and were they to turn to other avenues of employment outside Government work and do it with the same zeal, earnestness, fidelity, and efficiency as they do in the Customs Service, a private employer with due regard to his own interest would give them a large increase over what their official salaries are. They are necessarily required in wind and weather, and in storm and often amid great difficulties, to perform their service; and they have performed it well, and I am glad that at least something has been done toward helping this very deserving class of Government employees. In

the light of living conditions, the ever-increasing cost of living, the inability of these men, especially in the large cities, to get along with the meager pay they are receiving, and so that they may properly and decently provide for themselves and their families, it is but meet and proper that the Government should properly provide suitable compensation. Even this bill fails to give those men what they in justice and fairness ought to get. This however, is a step in the right direction, and I am glad to support the bill.

Mr. Pell: Mr. Chairman, no one who has ever returned to the United States can have failed to notice the courteous and efficient treatment that he has received from the customs officials. I have come through several American customhouses myself and have been impressed every time with the thoroughness, the politeness, and the sense of duty displayed by these men. Of course, there have been complaints, but my own observation is that in every case the complaint is a would-be smuggler.

These men belong to a particularly hard-used class. They must have a certain education and must keep up a certain amount of appearances. They are like all people on small, fixed incomes, being crushed between the devil and the deep sea. We should, I think, do what we can to relieve their case.

* * * * *

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DEC 14
CHARLES ELMORE CROPLEY

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

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JOHN H. ARBLE

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vs.

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WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS

ROBERT M. DRYSDALE,
Attorney for Respondents,
1538 Dime Building,
Detroit, Michigan

Interstate Brief & Record Co., Case Bldg., 457 Fort St. W., Detroit, Mich.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The first opinion in the Court of Claims is reported in 92 c. cls. 447, and ordered re-argued on Court's motion in 94 c. cls. 712. The last opinion is not yet officially reported.

QUESTIONS PRESENTED

The principal question presented is whether the night, Sunday and holiday services performed in these cases fall within the grant of additional pay for services performed for private interests outside the Customs House hours of a port when free customs service is available, although such services are performed within a given number of hours per week?

STATUTES AND REGULATIONS INVOLVED

Liability is predicated upon the administrative provisions of the 1922 Tariff Act (42 Stat. 948, 954) as re-enacted in the 1930 Tariff Act (46 Stat. 708; 19 USC 1401, 1450, 1451) and into which is incorporated by specific reference, Section 5 of the Act of February 13, 1911 (36 Stat. 901) as amended by Act of February 7, 1920 (41 Stat. 402, 19 USC 267), and which amendment is hereinafter referred to as the new Section 5.

The pertinents provisions of Sections 401, 450 and 451 of the Tariff Act of 1930 appear in App. 79. The pertinent provisions of the new Section 5 appear in App. 80, and also, at App. 88, where it is shown as it appeared

in the Act of February 13, 1911, *supra*, and also as amended by Act of February 7, 1920, *supra*.

STATEMENT OF FACTS

Respondents dispute the administrative practices as stated by petitioner. The principal controversy centers upon the reasons alleged for the payment of additional pay for Sunday and holiday services performed from the time of the enactment of the 1922 Tariff Act through the period involved in these suits. Petitioners claim such payment was made because work on those days was in excess of 44 or 48 hours per week (depending upon whether before or after effective date of "Saturday after holiday law"). Respondents contend that during the whole period from 1922 until the opening of the Ambassador Bridge in 1929, that Sunday and holiday pay was allowed because it came within the grant of additional pay provided by Congress for work on those days, and that any other reason for such payment would have been illegal and in violation of the statute and the regulations issued thereunder.

Respondents further claim that when the Ambassador Bridge was opened, additional pay was continued at certain facilities,[1] and discontinued at the remaining facilities,[2] under the illegal guise of paying the additional Sunday and holiday pay by "compensatory time off" during the week; that is, instead of requiring the em-

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[1]The Railway ferries, i.e., Pere Marquette, Wabash, Grand Trunk and Michigan Central (Passenger Division).

[2]Ambassador Bridge, Detroit & Windsor Ferry, Walkerville Ferry and Michigan Central (Freight Division, but not Passenger Division). Additional pay was never given at Ambassador Bridge or Detroit & Canada Tunnel, when later opened.

ployees to work seven days and pay them the additional pay granted for Sunday and holiday work, the additional pay was refused because compensation therefor was otherwise granted by giving the employee such "compensatory time off."

The only dispute as to the adequacy of the base pay or the additional pay, is that respondents were refused the additional pay granted by Congress for the work herein involved and which was performed at night and on Sundays and holidays.

An error has been made in that part of Finding No. 6 by the Court of Claims, which states that throughout the period involved in respondents' claims additional pay was first collected by the collectors of customs and then remitted by him to the Inspectors by check on the fund so collected. When the 1936 Deficiency Appropriation Act became effective, the practice in Detroit was changed immediately, and thereafter payment to the Inspectors was made by the United States direct to the Inspectors before collection of the amounts from the carriers.

This error appeared in the findings of the Commissioner, to which respondents filed objections, and to cover which point they filed with the Court a request for a special finding, copies of which objections and request for special finding appear in App. 91, 92. The error in not having that finding before this Court, accompanied by the testimony in the record, is the fault of counsel, who overlooked that particular point. If it becomes material and necessary we request permission to have the record supplemented so as to bring before the Court the undisputed evidence on that point. Such practice was conceded by petitioner in the Court below, and there never was any dispute regarding the same.

SUMMARY OF ARGUMENT

I.

JURISDICTION

The petition sets forth a cause of action within the provisions of the Tucker Act (28 U.S.C. 250 (1)). The action is based on an act of Congress and the regulations issued thereunder, and also upon a contract which is either express or implied in fact.

Under the provisions of the pertinent act, the night, Sunday and holiday hours of respondents were requisitioned by their employer, the Government, for services to be rendered for the benefit of private interests, with a fixed rate of compensation provided therefor. The statute required payment to be made to respondents by the United States through its agent, the collector. Under the provisions of the statute, a cause of action arises under an act of Congress. Respondents are not concerned with the other provisions of that statute which require the collector to collect the additional pay from the carriers. Government assumed that duty through its agent, the collector, and safeguarded itself by directing the collector to exact a bond "conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license. * * *"

Also the action is founded upon contract. The terms of the contract are fixed by the statute and regulations issued thereunder which provide that the customs employees perform certain services. The statute fixes their rate of pay, and when the inspectors perform those services, the statute raises an implied promise to pay the amount so fixed.

The point suggested by petitioner, that there could be no contract implied in fact in these cases because of the circumstances under which the services were performed, is not well-founded and has been adjudicated by the decisions of this Court. Under those decisions, it is unlawful and against public policy for any government official, including the President of the United States, to interfere in any way with the compensation provided by Congress for government employees, and any such interference, and subsequent acceptance of the situation by the employees, does not prevent the contract implied in fact from arising, by performance of the service.

II.

STATUTORY PROVISIONS AND REGULATIONS

The statute and regulations issued thereunder create a grant of additional pay to the field force of customs employees for working at night or on Sunday or on a holiday. The history of that grant springs from act of March 2, 1799 *(infra)*, and by the 1922 Tariff Act *(supra)* the grant was broadened to include all the services here involved. In the grant, night services and Sunday and holiday services are placed in the same category. That grant is not here conditioned, nor has it ever been conditioned upon performance of other hours of service. Government created this grant as a means of saving it from the obligation of an admittedly necessary and substantial increase in pay to customs employees.

Under the terms of this grant, the services of those employees could be, and were, requisitioned for night, Sunday and holiday hours which were outside of the weekday, daylight hours of the port, when free customs service was available. Service during those unusual hours

was considered to be for the benefit of carriers desiring such services at those hours. The additional pay was made a charge against the carriers receiving the benefit of the services, payable to the United States, so that the increase in pay was thus accomplished by the requisitioning of the night, Sunday and holiday hours of customs employees for the benefit of carriers, and requiring the carriers to pay the additional compensation and to save the United States from the liability thereof.

III.

LEGISLATIVE HISTORY AND CASES CONSTRUING THE PERTINENT STATUTE

The history of pertinent legislation dates back to Act of May 8, 1792 *(infra)*, which act fixed the duties and authority of the Secretary of the Treasury with respect to the customs service. By Act of March 2, 1799 *(infra)*, unlading of vessels was prohibited at night or on Sundays or the Fourth of July, except under special license which was issued by the collector, which, in practice, was used when necessary to avert damage to cargo. The services of customs inspectors could not be requisitioned at night or on Sundays or the Fourth of July for the unlading of cargo from vessels, and when the special license to unlade was issued, it resulted in the inspectors bargaining with the master of the vessel as to the rate of pay for the night, Sunday and Fourth of July services. In those days, services in connection with unlading of vessels constituted practically all the services performed by the inspectors, so that practically all the night, Sunday and Fourth of July hours of inspectors were then protected against invasion. The additional pay so earned by customs inspectors subsequently became an important item in their total pay.

By Act of March 3, 1873 *(infra)*, Government took over the matter of regulating the additional pay, by making provision for a special license to unlade at night, and requiring the collector, under regulations to be issued by the Secretary of the Treasury, to fix a reasonable rate of pay for customs inspectors for night services. Government took over the collection of that pay for the benefit of the inspectors by requiring the collector to make collection thereof from the master or owner of the vessel, and to pay the same to the inspectors. The act was, in effect, a grant of additional pay for night services in connection with unlading of vessels.

By act of February 13, 1911 *(infra)* that grant of additional pay was broadened to include night, Sunday and holiday services and additional employees were covered by the grant. By act of February 20, 1920 (new Section 5 *supra*) the grant was broadened to include additional employees, and the rate of pay increased, the admitted purpose of the increase then being to provide a substantial increase in the pay of customs employees.

By the Tariff Act of 1922, the grant was broadened to include all the services here performed and the provisions of that act were reenacted into 1930 Tariff Act, upon which these suits are based.

The present statute has been construed by the Courts in the cases of *Port Huron and Sarnia Ferry Company v. Lawson*, 292 Fed. 216; *Ferguson v. Port Huron & Sarnia Ferry Co.*, 13 Fed. (2) 489; and *Mellon v. Minneapolis, St. Paul & S. S. M. Ry.*, 11 Fed. 2d, 332. Those cases upheld the grant of additional pay to all the facilities here involved except the Ambassador Bridge and Detroit and Canada Tunnel, which were not then in operation. The application of the act as to those facilities, except the bridge and tunnel, is conceded by petitioner.

The proceedings before congressional committees in the 67th and 71st Congress, cited by petitioner, were in connection with desperate efforts by carriers to relieve themselves from the obligations of the additional pay. The proceedings in 75th Congress were the results of an effort of the Treasury Department to make statutory the practices of the Bureau of Customs which, since enaction of the Tariff Act of 1922 had violated the law and regulation of the Secretary. All of those demands were refused by Congress. The information given to those committees by persons not even members of Congress, constitutes one of the petitioner's main defenses, although such information was informative only as to the intricacies of the practices then in use by the Bureau of Customs. Those proceedings have little or no probative value in construing the pertinent statute.

IV.

MEANING OF "OVERTIME SERVICES"

The word "overtime" was first used in this legislation in the new Section 5 in 1920. It was not there used in any sense as requiring weekday service to be performed as a condition for the earning of night, Sunday or holiday pay. At the time of that enactment and until act of May 29, 1928 *(infra)*, the statute and the pertinent regulations issued thereunder specifically required the field force of customs employees to work 365 days per year, and if they failed to work on Sundays or holidays, those days were charged against them.

Also, by statute, there was no limitation to the number of hours per day to be worked. The regulations specified certain official daylight hours of service, but specifically reserved the right to extend those hours as the needs of the service might require, and without extra compen-

sation. In practice, customs employees were required to work long hours,—sometimes through the night after having worked all day, and then through the succeeding day. There was no limitation to the right of Government to requisition those hours. The only protection afforded the employees was the right of additional pay when they were assigned to duty at night or on Sunday or on a holiday. Under such a statute, "overtime" as contended by petitioner, is impossible.

Furthermore, the new Section 5, by its own terms, defined what was to be deemed overtime, and the definition given is services performed after 5 p.m. and before 8 a.m. and on Sundays or holidays.

The words "overtime services" in the new Section 5 (1920) were used in substitution for the words "night services." In drafting the language of the new Section 5, it became necessary to use words in place of "night services" as appeared in old Section 5, which would describe Sunday and holiday services, as well as night services, and so the words "overtime services" were used in the new Section 5 in substitution for the words "night services" in the old Section 5 and were so used to denote services performed between 5 p.m. and 8 a.m. and on holidays and Sundays.

V.

WORKING HOUR PROVISO, SO-CALLED

The working hour proviso, so-called, authorizes the Collector of a port to regulate the official hours of a port, which were then fixed for the nine hour period between 8 a.m. and 5 p.m., so as to conform with the customary working hours of employees in other industries whose

services are necessary in connection with the lading or unlading, such as the longshoremen at New Orleans, who worked from 7 a.m. to 4 p.m.

Petitioners' construction of that proviso is excluded by its very terms, which prohibit the collector from altering or affecting in any manner the overtime pay fixed in the statute, or the length of a working day for custom employees. When enacted, that proviso applied only to vessels and other conveyances carrying cargo and arriving at a port, and did not not apply to border facilities here involved.

The authority claimed by petitioners under that statute makes it unconstitutional in derrogation of Art. 1, Sect. 1 of the Constitution of the United States, which provides that all legislative power granted to the Federal Government shall be vested in Congress.

VI.

PETITIONER'S CLAIM OF SET-OFF

Petitioner claims the right to charge respondents for the hours not served by them during the time when they were performing the night, Sunday and holiday services for which additional pay is sought. The amount of the charge is computed on the basis of dividing the annual base pay of $2100 by 360. Respondents become entitled to their annual pay by qualifying as customs inspectors and performing the duties assigned to them. Their right to the annual pay does not depend upon the number of days worked so long as they serve as directed by their superiors in office. If the assignments to duty are for work at night or on Sundays or holidays, they earn the additional pay granted by Congress. That pay, by statute, and by regulation, is to be in addition to the annual pay.

VII.

SPECIAL CONSIDERATION OF AMBASSADOR BRIDGE AND DETROIT AND CANADA TUNNEL

These facilities fall within the definition of vehicle in the Tariff Act which includes every description of carriage or other contrivance used or capable of being used as a means of transportation on land. A bridge over a river, or a tunnel under a river, certainly are means of transportation. They both accomplish the same purpose as a ferry. Respondents concede that the ferries come within the scope of the pertinent statute. To exclude the bridge or tunnel from the operation of the statute produces an absurd result, and one which tends to defeat the purpose of the act, which was to increase the pay of customs employees.

ARGUMENT

I.

JURISDICTION AND LIABILITY OF GOVERNMENT

Section 450 of the Tariff Act describes certain merchandise, passengers and baggage which may be admitted into the United States at night or on a Sunday or a holiday, upon certain conditions therein named. Section 451 of the act provides for the requisitioning of the services of customs employees in connection with such unlading, and grants to them the right to receive night, Sunday and holiday pay for those services at the rate fixed by Section 5. By the terms of Section 5, the collector is directed to collect the additional pay from the carriers and

> "* * * pay the same to the several customs officers and employees entitled thereto, * * *"

Those provisions vest in the employees the right to receive the additional pay therein described, and that right is not conditioned upon the collector performing his duties for his principal, the Government. Nothing appears in that statute restricting the right of the officers to receive their compensation.

The United States assumed the burden and responsibility of making collection from the agencies of transportation receiving the benefit of those services. Those provisions merely provide the method for the agent of the United States, the collector, to carry out his duties. The employees have nothing whatever to do with those duties. They must serve where and when directed by their superiors (1937 reg. Art. 1339(b), App. 88), and the collection of the charges is entirely out of their control.

There can be no contractual relations between the inspectors and the transportation companies. The inspectors must needs look only to their employer for pay, and they

have no right of action against anyone except the United States. The acts of Congress forbid a government employee from receiving pay for his services from a private source.[1] Customs officials were especially forbidden to receive such payment.[2]

By Act of March 3, 1873 (1 Stat. 665; R. S. 2871) when Congress made the first grant of pay for night services, it acknowledged the liability of the United States to its employees, whose services were then permitted to be requisitioned, by requiring the collector to exact a bond, the only condition of which was

> "To indemnify and save the collector harmless from any and all loss and *liabilities* which may occur or be occasioned by the granting of such special license." (Italics ours.)

The principal liability, if not the only one, covered by that bond was the liability for the additional night pay that would accrue to the inspectors. No such bond had been exacted before, and of course its principal purpose was to protect the United States against loss or *liability* by reason of its assuming the collection of those funds which would accrue to it by reason of the requisitioning of the services of its employees for the benefit of private interests.

When in 1911 the grant of night pay was broadened to include Sunday and holiday pay, Section 2 of Act of February 13, 1911 (36 Stat. 899) changed the condition of that bond to read as follows:

> "To indemnify and save *the United States* harmless from any and all laws and liabilities which may occur or be occasioned by reason of the granting of such license or the issuing or granting of such per-

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[1] Act of March 3, 1917; C. 163, S. 1; 39 Stat. 1106.

[2] R. S. 1719; 49 Stat. 864.

mit for immediate lading or unlading." (Italics ours.)

The 1922 Tariff Act changed the condition of the bond to read as follows:

> "To indemnify the United States for any loss or *liability* which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees whose services are required in connection with such unlading at night or on Sunday or a holiday, * * *" (Italics ours.)

It is clear, that adding to the old condition of the bond, the new condition "to pay the compensation and expenses of the customs officers," was because of abundant and perhaps over-anxious caution on the part of the framers of that act. It in no way detracts from the liability acknowledged on the part of Government.

Petitioner argues that the inclusion of the new condition in the bond renders the old condition a surplusage, unless such condition is made to refer to a definite liability. Certainly before that enactment the word "liability" included the liability incurred to customs employees, and a different meaning cannot be given to that word simply by including other language with it.

That the new condition was added to the bond out of abundant caution is conclusive. The doctrine of "surplusage" is not here applicable.[1]

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[1] See *U. S. v. Bassett*, 2 Story U. S. 389, 402, in which Justice Story pointed out the limitations of the "surplusage" doctrine, and that there are very few acts of legislation which do not fall within that predicament, and referred to Hamilton's citation to the Constitution of the United States which grants power to Congress "to lay and collect *taxes, duties, imposts* and *excises*." (Italics ours.) The Court held that the objection is not of itself just ground to alter the interpretation of any clause of an act, otherwise sensible and satisfactory, in order to escape the imputation of being unnecessary.

By deficiency appropriation Act of 1936 (Act June 22, 1936, c. 689, 49 Stat. 1636) Congress again recognized its responsibility and liability by authorizing payment of the additional compensation to the employees before receipt of the same from the carriers. Act of March 4, 1923 (s. 6, 42 Stat. 1454, 19 U. S. C. 52) directs that the compensation of all customs officers and employees shall be paid from the appropriation for the collection of the revenue from customs.

Petitioners cite at great length statements made in Congress and before committees, to the effect that it was contemplated that the carriers receiving the benefit of the services would pay therefor. That no doubt was a part of the plan. All that was necessary to carry out the plan was for the agents of the Government to enforce the provisions of the act. The Government chose to assume that duty, and the failure of its agent, the collector, to perform the duties of his principal, does not affect the liability of the United States to the customs employees.

Upon completion of the services they became a charge against the Government in favor of the employees, and at the same time became a charge against the carriers in favor of the United States. There is no occasion for the Government to take a loss, as the carriers are still liable and the statute of limitations does not run against the Government. Furthermore, there is no logical reason why these services should be performed for private interests at such unusual hours by the employees on demand of their employer, the Government, without the compensation fixed by statute. The charge should be collected from the carriers and not imposed upon the employees or Government.

When those services were performed by the employee they became entitled to the pay fixed by the act. A statute

which establishes a salary, or prescribes a rate of remuneration, expresses the intent of both parties, and becomes the contract between the Government and its employees. (*Upton v. United States,* 19 c. cls. 46, 49.)

Petitioner's construction of the statute would permit the collector to deprive another Government employee of the pay provided by Congress, by neglecting to comply with the law. Such a result is illegal. (*Geddes v. United States,* 38 c. cls. 428, 442.)

A court should not construe a contract so that one party will be wholly exempt from liability for his own acts.

Gulf Transport Co. v. United States, 43 c. cl. 183.

A case similar to those under consideration is that of

Sausser v. United States, 9 c. cls. 338, 341.

That case involved the embezzlement by a Collector of Internal Revenue of a deposit made by a contractor for a meter for use in distilleries under a statute requiring such meters to be installed and the money therefor deposited with the collector. The principles there cited by the Court of Claims are peculiarly applicable to these cases.

> "The Government chose to assume the responsibility of receiving these deposits, instead of allowing distillers to deal directly with the manufacturers of the meters. The Collector was an agent of the Government, which had a discretion in selecting him, and was not the agent of the distiller, who was compelled against his wishes to deal with him. The loss, therefore, must fall upon the principal of this agent, which is the Government."

To the same effect is

Crain v. United States, 25 c. cls. 204.

From a practical standpoint, this problem of who should pay for these services was solved by Congress in the only legal manner possible. The only manner by which the plan could be carried out legally was for the Government to assume the obligations of payment to customs employees, and to reimburse itself from the agencies of transportation involved, and this is just exactly what it did accomplish.

Payment necessarily had to be made by Government through the collector, to the inspectors, and the extra compensation had to come out of the funds of Government and Government became liable for the extra compensation. The failure by the Government to collect from the agencies of transportation did not relieve it from the liability for the payment of the extra compensation.

The petition states a cause of action founded on an Act of Congress and also a contract which is either express or implied in fact.[1]

II.

STATUTORY PROVISIONS AND REGULATIONS

Section 450 of the Tariff Act provides that no merchandise, baggage, or passengers arriving in the United States from any foreign port or place, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night without a special license issued by the collector. In Section 401 "vehicle" is given a broad definition to include every description of carriage or other contrivance

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[1] *Glavey v. U. S.*, 182 U. S. 595, and cases therein cited.
U. S. v. Andrews, 240 U. S. 90;
U. S. v. Hvoslef, 237 U. S. 1, 10;
Medbury v. U. S., 173 U. S. 492, 497.

used or capable of being used as a means of transportation on land.

No exceptions or limitations whatsoever are made to the necessity of such a special license. The collector is given no authority to make any determination as to whether or not such a special license is necessary. Nor is such authority vested in the Secretary of the Treasury. Assuming that the Ambassador Bridge and Detroit and Canada Tunnel fall within that definition of "vehicle" then all of the unlading involved in these suits should not have been permitted by the collector.

Petitioner admits that all such unlading was permitted to take place without such special license and relies on that fact as one of its defenses. Although there is no ambiguity in the plain language of the statute requiring such special license, nevertheless petitioner claims the right to resort to extrinsic aids in its construction and excuse compliance with the mandates of the statute by reading something into it not expressed therein.

Section 451 prohibits the granting of any such special license without the filing of a bond conditioned to indemnify the United States against loss or *liability* which might occur or be occasioned by reason of the granting of such special license and to pay the extra compensation of the customs employees who may be assigned to duty in connection with any such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5. Section 452 of the act extends the foregoing provisions to lading of any merchandise or baggage for transportation under bond, or for the exportation with the benefit of drawback. Section 453 of the act provides drastic penalties for lading or unlading of merchandise or baggage without the special license. Section 454 provides

drastic penalties for unlading of passengers without such a special license.

The penalties of both sections are directed to the master of any such vessel or the person in charge of any such vehicle, and every person who knowingly is concerned or who aids therein, or in removing or otherwise securing such merchandise or baggage, or in unlading of passengers. It is in these sections that the substantive rights of customs employees to receive extra compensation is created. Note that the remuneration mentioned is described as compensation for night, Sunday and holiday services. The word "overtime" is not used in these sections.

Section 451 requires payment for such night, Sunday or holiday services to be made in accordance with the provisions of Section 5. If there were any conflict between the provisions of the Tariff Act and those of Section 5, the provisions of the Tariff Act would control, because they were enacted subsequent to the enactment of Section 5 and are paramount.

The applicable rule of construction was stated by this Court in *Interstate Railway Co. v. Mass.* 207 U. S. 79, at page 84, as follows:

> "If the document was identified it would not matter what its own nature or effect might be, as the force given to it by reference and incorporation would be derived wholly from the charter."

When a statute is incorporated into a later statute by reference, it is only the appropriate parts of the adopted statute that are given effect. The province of the adopted statute is to carry out the purposes and provisions of the adopting statute. (*Sutherland Stat. Construction* 3d Ed. Vol. 2, p. 549.) However, there is no conflict between the provisions of Section 5 and those of the Tariff Act. The

rights conferred by Section 5 are restated with additional emphasis and particularity in the Tariff Act.

The province of the new Section 5 is simply to fix the rate to be paid, and to adopt the procedure necessary to accomplish the purposes specified in the Tariff Act (*Mellon v. Minn. St. Paul & S. S. M. Ry.*, 11 Fed. (2d) 332, 334). In that case the Court stated:

> "The reference to Section 5 contained in Section 451 relates merely to the manner in which the additional pay shall be computed, and by whom it shall be paid. It in no respect limits the scope of 'vehicle' as used in the present Act to that of 'conveyance' as used in the former Act."

Following the mandate of the provisions of the new Section 5, the Secretary of the Treasury issued suitable regulations providing for the payment of the extra compensation for which this statute provided, and fixed the rates as specified in the statute. These regulations appear in T. D. 38290 issued under date of February 21, 1920, and have been in effect ever since that date.

Respondents contend that this statute is a continuation of the plan adopted by Act of March 3, 1873 (*infra*), of granting to customs employees separate and distinct items of pay. One is for day work during the customs house hours of a port which are performed primarily for benefit of Government and when free customs service is available. The other is pay for working at night and on Sundays and holidays in connection with certain designated services, the cost of which is to be reimbursed to Government by the agencies of transportation receiving the benefit of the services. The two items of pay are separate and distinct, and neither is dependent on the other, except that the rate of one is based upon the rate of the other. They are as though two separate offices were created with a rate of pay fixed for each office.

III.

LEGISLATIVE HISTORY AND CASES CONSTRUING THE STATUTE

We herewith submit a brief history of pertinent legislation.

Act of March 2, 1799 (1 Stat. 665, 667)

Pertinent provisions of the above act appear at App. 85, 86.

That act prohibited unlading of goods, wares and merchandise from vessels, from a foreign port, at night, or on Sunday or the Fourth of July, except under special license, which was issued only for the purpose of averting damage to cargo. Special provisions were made for unlading in cases of distress. The services of customs inspectors could not be requisitioned for work between the setting and rising of the sun, or on Sundays or on the Fourth of July. Those provisions related only to unlading cargo and not to passengers and baggage. However, in those days the unlading of cargo constituted practically all of the work of customs employees, so that those provisions affected practically all of their working hours. There was little passenger traffic in those days and no revenue to be protected at the Mexican and Canadian borders.

Because of those provisions, the matter of additional pay for customs inspectors for unlading at night, on Sundays and the Fourth of July, was left to negotiation between the master of the vessel and the inspector because of the fact that the law did not permit the requisitioning of the services of the inspectors during those hours.

The right of customs employees to additional pay for night, Sunday and holiday services granted by that act

has never been impaired, but on the contrary the grant was protected by making the rate of pay uniform and controlled by Government and increased from time to time and extended to additional employees and facilities. If petitioners definition of overtime is given effect it would be the first and only time that the grant would have been curtailed. By that act, the day pay of customs employees was fixed on a per diem basis at not more than $2.00 "for days actually worked in aid of the customs" and they remained on a per diem basis until Act of May 29, 1928, (§ 865, 31, 45 Stat. 955).

Act of March 3, 1873 (17 Stat. 579, R. S. 2871)

By the above act, Government placed the item of additional pay on a better basis by terminating the fixing of the rate by negotiation, and directing the collector, under regulations to be issued by the Secretary of the Treasury, to fix a uniform and reasonable rate of *compensation for night services* of inspectors and to collect the same from the master, or owner, of the vessel and pay it to the employees entitled thereto.

The act required a special permit to unlade to be obtained from the collector who was directed to exact a bond conditioned to save the collector harmless from all *liabilities* arising because of the issuing of the special license, thus acknowledging the liability of Government. The act related only to night services in connection with unlading cargo from steamships and did not affect work in connection with unlading of passengers and their baggage. It was a grant of additional pay to customs employees, separate from their day pay and not conditioned in any way on other hours of work.

Under that act, if two inspectors worked side by side at night to unlade a vessel, one examining cargo and the other

examining passengers and their baggage, one would receive additional pay and the other would not, thus illustrating that it was the intention of Congress to grant additional pay for certain night services which it described with particularity and not for some other kind of service which it failed to describe, such as overtime services, as contended by petitioner.

At that time the day pay which the inspectors received from Government was fixed at $4.00 per day. It had been increased to $3.00 per day by Act of April 26, 1816 (3 Stat., 306) and by Act of April 20, 1864 (13 Stat., 51), the Secretary of the Treasury had authorized an increase of $1.00, and that discretion was exercised. The increase was effective only until July 1, 1865, but by Act of July 23, 1866 (14 Stat. 208) it was continued in force.

Realizing that the additional pay was necessary, Congress made it uniform and controlled it and adopted the expediency of fixing its burden on the carriers because they received the benefit of having the services performed outside the custom house hours when free customs service was available.

Before, and at that time, the day pay of customs inspectors had long been inadequate to sustain them and their additional pay was a necessary item in their total pay. That was conceded. (S. Rep. No. 380, 41st Cong., 3rd Sess., p. 69.)

The additional pay was made uniform and statutory and Congress then adopted the expediency of casting the burden of that additional pay upon the carriers, upon the theory that services performed outside of the official daylight custom house hours of a port were primarily for the benefit of the carriers who should be required to pay the additional compensation, and so by that act Congress con-

tinued its policy of relieving Government from the burden of that additional pay and cast it upon the carriers and at the same time requiring the employees to work during unusual hours to earn the additional pay.

By Act of June 26, 1884 (23 Stat. 59, amending R. S. 2872) the provisions of the Act of 1873 were extended to sailing vessels. By Act of June 30, 1906 (34 Stat. 633), Sec. 2871 (R. S.), the act was amended to include lading as well as unlading of cargo and its provisions were extended from "vessels" to "vessels and other conveyances." This amendment presumably was for the purpose of allowing lading and unlading of bonded merchandise from railroad cars.

By Act of March 4, 1909 (c. 314, s. 2, 35 Stat. 1065), the Secretary of the Treasury was authorized, in his discretion, to "increase and fix" the pay of customs employees not to exceed in any case "the rate of $6.00 *per diem*." He tried to decrease, instead of increase, the pay of Inspector Williams, which resulted in the case of *Cochnower v. United States*, 248 U. S. 405, in this Court.

Act of February 13, 1911 (36 Stat. 899; App. 53)

The purpose of this act, as expressed in its title, was to provide for the unlading of vessels and other conveyances at night and for other purposes. It contained five sections and a repealing clause. The first four sections described the agencies of transportation to be affected by the payment of extra compensation. Section 5 fixed the rate and the method of collection by the collector of customs, and the payment to the customs officers performing the services.

The plan followed the expediency adopted in 1873 by requiring the United States be reimbursed by the carriers

receiving the benefit of the services. Section 5 required the Secretary of the Treasury to fix the rate of pay and also provided

> "* * * the said extra compensation to be paid * * * to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed by the secretary of the treasury."

The effect of this act was to enlarge the grant of additional pay and as in the case of Act of March 3, 1873, provision was made for a special license and for the filing of a bond to save Government from the liability.

In this act appeared the first provision made for appropriation of Sunday and holiday services for unlading of cargo. The wording of the act was peculiar: The Secretary of the Treasury was required to fix a rate of extra compensation for night services, with no mention of fixing such a rate for Sunday or holiday services, although payment for Sunday and holiday services was provided for in Section 5 of the act.

Status of Mr. William H. Bond

Petitioner cites at great length testimony taken at Committee Hearings in the 66th Congress (1920), 67th Congress (1922), 71st Congress (1930), and 75th Congress (1938).

Before proceeding with this history, we call the Court's attention to the fact that practically all of the testimony adduced at such hearings was given by William H. Bond and because of the great power attributed to him by petitioner, we deem it expedient to discuss his relationship with this legislation. In citing the testimony taken before such hearings, it is Mr. Bond that is referred to by peti-

tioner, with such phrases as "sponsor of Act 1911," "representative of the customs inspectors and their associations all over the country," "representative of customs inspectors association," "the person who drafted the 1920 amendment," "who spoke for the largest organization of customs inspectors," "a person who was successful in obtaining the passage of legislation which he advocated."

By reputation, Mr. Bond was a fine gentleman but we believe he was too modest to have accepted such praise and responsibility. From this testimony* it appears that he was a customs inspector from Boston; that he was president of a National Association of Customs Employees, which apparently was a very loose organization and which had not held a meeting for a long time; that his constituents were from the seaboard ports, but that he was somewhat known to the inspectors from the west; that he was not attempting to do anything for the inspectors on the Texas and Canadian borders because, as he put it, "they had a difficult situation and nothing could be done for them" (Hearings *(supra)* p. 13); that his interests were centered in getting increased pay for his constituents at seaboard ports.

With due respect to Mr. Bond and with no criticism of him personally, we point out that he in no manner represented respondents nor the customs officials at the Canadian or Mexican borders and that his interests admittedly were adverse to theirs and that he was willing that Congress discriminate against them in favor of his constituents at the seaboard ports, by denying the additional pay to the ones, while granting it to the others.

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*Hearings, House Sub-committee on Ways and Means on H. R. 6577, 66th Congress, First Session, pp. 3, 4.

Act of February 7, 1920, 41 Stat. 402; U. S. C. (1940) Title 19, Sec. 267 (App. 88)

The above act, except the customary working hour proviso, so-called, with which it concludes, was introduced by the Treasury Department with the approval of the United States Shipping Board and of the American Steamship Association.*

The act was passed by both houses in Committee of the Whole. In the appendix at p. 100, we quote statements made on the floor at the time of its passage which show conclusively that Congress realized that customs officers were a much underpaid group of Federal employees and that for the good of the service it was then mandatory that a substantial increase in their pay be granted.

Mr. Treadway, the Manager of the Bill, stated that the pay of these inspectors has been very low, the rates being four, five and six dollars per day for a ten-hour day. That was in 1920. It is to be noted that these suits cover the period from 1931 to 1937 and are based on a rate of $5.83 per day, which is but a very little over the $4.00 rate, established in 1864, although the increase in the cost of living during that period of seventy-seven to eighty-three years of this country's growth had increased vastly more in proportion than the meager increase in pay reflected by these figures. The necessity of relieving the distressed financial condition of customs employees was conceded.

Mr. Huston from New York clearly expressed the situation then existing by referring to a letter describing

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*Report of Committee on Commerce, Senate No. 306, 66th Cong., 1 Sess., also *International Railway Co. v. Davidson*, 257 U. S. 506, pp. 512, 513.

those conditions and received from the collector of the port of New York in which the collector stated substantially as follows: That these men were then getting practically the same scale of wages given them a quarter of a century ago; that they were rapidly losing their most efficient men; resignations were coming in daily; the force was then materially reduced beyond what it was prior to the first World War; merchants' associations and other organizations had interested themselves in the situation and were making appeals to Congress to take some steps in the direction of safeguarding the interests of importers and exporters. He pointed out that customs officials were harrassed with the consciousness that in many instances their children were suffering from the want of proper food and clothing, and that in spite of their knowledge that their employer, the Government, was the richest government in the history of the world, they still must go in poverty.

At that time (1920) the pay of customs inspectors was still controlled by the Act of April 29, 1864 *(supra)* which provided for a pay of $4.00 per day. The only change that had taken place since 1864 was that provided by Act of 1909 *(supra)* which authorized the Secretary of the Treasury to increase the wages of customs employees not to exceed, however, $6.00 per day.

According to the testimony of Mr. Bond, referred to by respondents, appropriations were made by Congress for such increases for two years but such appropriations were used for other purposes and that at his port (Boston) nothing was done to raise any pay until 1912, and that in 1920 about forty out of ninety inspectors at Boston were still on the $4.00 rate fixed in 1864.[1]

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[1] Sub-committee of Committee on Ways and Means on H. R. 6577, October 11, 1929, p. 15.

The Treasury Department recognized that an equitable administration of the new Section 5 would require the spreading of assignments to duty at night and on Sundays and holidays evenly throughout the whole force. This is reflected by a provision of the regulations issued by the Bureau of Customs in 1920 as follows:[2]

> "With a view of equalizing as far as practicable, the extra compensation derived, assignments will be made to night work according to the rating order, exception only being made for reasons good to the assigning officer."

The act broadened the grant of additional pay again, by extending the services to which it applied to unlading passengers and their baggage, and it increased the rate of pay. It also removed the matter of additional pay from departmental regulations by making the rate statutory (App. 101).

The wording followed the same form as Acts of 1873 and 1911 by requiring the Secretary of the Treasury to fix a rate of extra compensation, notwithstanding the rate was made statutory. After this enactment the only activity to which the word "fix" could relate would be to require the Secretary to issue regulations carrying into effect the statutory rate. Accordingly he issued T. D. 38290 (1920) and ever since that time the statutory rate has been carried in the customs regulations.

The Act terminated an abuse to which customs inspectors had been subjected. Oftentimes customs inspectors would be called to duty at night and on Sundays and holidays for the purpose of unlading vessels and after being

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[2] "Manual for the Guidance of the Outdoor Force of the Customs Service, 1920," on page 19.

required to remain on duty awaiting the arrival of such vessel, they were not paid for such services unless the vessel actually arrived and the unlading took place and also they were oftentimes required to remain on duty after 5 p.m. awaiting the arrival of such vessel and, likewise, were not paid unless the actual unlading took place (59 Cong. Rec., part 2, 66th Cong., p. 2171; App. 101, 102).

To correct that abuse, the amendments as appearing in the new Section 5 required payment of such extra compensation when the customs employee had been ordered to report for duty and had so reported and "remained on duty" regardless of whether the unlading took place or not (*id.*). The injustice of depriving them of such compensation was cited in the opinion of this Court in the Davidson case, *supra.*

In *Ferguson v. Port Huron and Sarnia Ferry Co.*, 13 Fed. (2) 489, 492, the Court pointed out that:

> "The word 'remain' in the clause referring to officers required to 'remain on duty between the hours' mentioned, means according to its proper interpretation, 'remain on duty after reporting for such duty.' The section itself provides that 'such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual work contemplated takes place or not. * * *'"

No change was made in the agencies of transportation to be affected by the extra compensation provisions of Section 5. In this act the word "overtime" was first used. Never before in all of this legislation, nor in any regulations thereunder, had the word "overtime" been used. How the words "overtime services" were substituted for the words "night services" as used in the old Section 5, is more fully discussed *infra*, p. 57. Peti-

tioner's construction of the words "overtime services" is based upon its contention that by using the word "overtime" in this section Congress thereby intended to divest customs employees of the grant of additional pay which they had theretofore enjoyed since 1799 to the extent that they would not become entitled to any further pay under such grant without first performing hours of service to be fixed in some manner, not quite clear, but which it is claimed with respect to the suits here involved, was fixed by the collector at the port of Detroit.

Petitioner cites certain statements made on the floor in Committee of the Whole at the time of the enactment of this amendment. These statements merely brought out the fact that more overtime would accrue at night on an eight-hour basis than on a ten-hour one. The matter of payment of overtime for working at night without first working during the day was not even discussed, nor was anything said or done from which it could be in any way intimated that Congress had any intent to impair the grant of additional pay that customs employees had theretofore enjoyed. It is a reasonable assumption that the concept of the meaning of overtime services then held by those members was that of work performed outside the customs house hours and reimbursable to Government. The final expression of their views with respect to overtime pay then being discussed is to be found in the words used in the statute.

Hearings, House Comm. on Ways and Means on H. R. 6577, 66th Congress, 1st Session, October 11, 1919

This committee had under consideration a bill to amend old Section 5, and which finally became the new Section 5. The committee had a letter before it from Mr. Rowe, Assistant Secretary of the Treasury, recommending the

legislation, and Mr. Bond was there to explain the intricacies of the customs laws and to secure an increase in the additional pay for his constituents at the seaboard ports. His was the only testimony taken.

Petitioner would explore the minds of Messrs. Rowe and Bond to ascertain what they meant by the word "overtime" and through them charge that meaning to the committee, and through the committee to Congress. The discussions involved night services only. Sunday and holiday services were not discussed, nor was the subject as to whether extra compensation became payable for night services, as such, as the plain language of the proposed Act indicated. The legislation under consideration was to affect only services in connection with vessels and other conveyances carrying cargo, and not to the facilities here involved.[1] Although it is apparent that Mr. Rowe thought otherwise at that time, because of the fact that immediately after the passage of the bill, the Treasury Department attempted to enforce its provisions with respect to the International Bridge involved in the Davidson case *(supra)*, and the eleven railroads crossing the Canadian border and involved in the Mellon case.[2]

The bill (Hearings, *supra* p. 3) as then being discussed does not contain the word "overtime," but describes with particularity the services to be affected by the increased grant of additional pay. The letter referred to (see petitioner's brief, App. 85) used the word overtime to describe services defined in the bill, and also referred to some arrangement to be made regarding tours of duty at night, and to be taken care of by future legislation.

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[1] *International Ry. Co. v. Davidson*, 257 U. S. 506.

[2] *Mellon v. Minneapolis Ry.*, 11 F. (2d) 332, certiorari denied, 271 U. S. 678.

It was at this meeting that Mr. Bond informed the committee that although the inspectors on the Mexican and Canadian borders worked long hours, nothing could be done for them. Evidently the Treasury Department thought otherwise, because of its attempted enforcement of the final measure on the Canadian border.

It is fair to assume that the outstanding concept of overtime in the minds of those two men, and that committee, was that it meant work performed at night or on Sundays or holidays when the burden of the pay would be cast upon the carriers; but it is not into the minds of those two that we should look to determine the effect of the statute, but to the plain meaning of the words used by Congress to express its intention.

The meaning of overtime which petitioner imputes to Congress through those two men impairs the grant of additional pay enjoyed by inspectors since 1799. There is nothing in those proceedings from which we can impute to Congress any intention to impair that grant. Those proceedings have no probative value on the interpretation of the pertinent statute.

The weight to be given to such statements is discussed in the case of the *United States v. Beaver Run Coal Co.*, 99 Fed. (2d) 610, 613, wherein the Circuit Court of Appeals for the Third Circuit stated:

> "We cannot gather the intention of Congress from the statement of a single member thereof (*United States v. Trans-Missouri Freight Association*, 166 U. S. 290, 17 S. Ct. 540, 41 L. Ed. 1007) but if we could, we would not be entitled to rewrite the statute to make it comply with his statements. That an act covers a somewhat broader field than Congress originally intended, does not confer upon the courts the power to read into that act restrictions and limitations which are not there."

International Railway Co. v. Davidson, 257 U. S. 506.

By including services in connection with the examination of passengers and their baggage in the grant of additional pay the Secretary of the Treasury concluded that the new Section 5 applied to the traffic over the International Bridge at Niagara Falls, which was a toll bridge carrying streets cars and pedestrian traffic, and attempted to enforce the provisions of the act at that facility resulting in the above mentioned case. This Court had little difficulty in pointing out that the new Section 5 was but a part of the Act of 1911 and that both the old and new Sections 5 affected only the agencies of transportation described in the first four sections of the act, and related only to vessels or other conveyances carrying cargo and did not relate to the plant of a toll bridge carrying street cars and foot passengers.

Also, it was pointed out that by the Act of 1799 and subsequent legislation, two distinct systems had been maintained for the examination of articles brought into this country, one relating to merchandise imported into the country and the other to passengers and their personal effects and that it could not be presumed that by merely broadening the extra compensation provision of Section 5 to include the examination of passengers and their baggage, that Congress thereby intended to terminate that system. The Court held that the provisions relating to passengers and their baggage is given full effect when applied to passengers arriving in vessels such as were described in the first four sections of the act.

Hearings 67th Congress (1922 Tariff Act)

Petitioner cites hearings before a Senate Committee on Commerce in the 67th Congress (1922 Tariff Act), on S-1504, S-1774 and S-3188. The statements again relied upon were made by Mr. Bond. Petitioner contends that the views expressed by him regarding the effect on extra compensation for eight hour shifts at night, was thought by the 66th Congress (1920) to be implicit in its provisions. Also, it is claimed that Mr. Bond interpreted the working hour proviso of the statute for the benefit of the committee and with the inference that the committee, and through that body, Congress itself, adopted Mr. Bond's views. Such inferences are entirely unfounded.

Two of the bills then under consideration, namely, S-1774 and S-2188, affected the customs service. Both bills were proposed as amendments to the new Section 5. One affected ferry companies operating vessels on regular runs from foreign ports not more than 200 miles distant, and the other affected railroad trains arriving from contiguous foreign territory. Both sought to have their respective facilities relieved from the obligation of the payment of additional compensation for night, Sunday and holiday services of customs employees which the Secretary had begun to enforce under his erroneous construction of the new Section 5, relating to passengers and their baggage.

When the hearings were being concluded the opinion of this Court in the Davidson case *(supra)* was handed down, from which it then appeared that the traffic with respect to railways and bridges then being discussed, was not affected by the provisions of the new Section 5. The committee made no report so there is nothing to indicate what recommendations it would have made to Congress regarding the problems discussed by Mr. Bond and others, and

on which there was *"implicit"* understanding, as suggested by petitioner, among all those seeking to escape the burden of the grant of additional pay.

Most of the operators of important railroads and international bridges in the country were represented at those hearings, and they were strenuously urging that Congress relieve them from the extra compensation provisions of the new Section 5. We concede that there was "unanimity" among them in their desire to escape that burden but that they "conceded" themselves liable for customs service only when performed on a "regular tour of duty" is refuted by the fact that one of the facilities there represented urged upon the committee a further amendment, by the terms of which it asked specifically to be relieved from the grant of additional pay for work performed within a 6-day weekly schedule. (See copy of bill, App. 90.)

That the railroads "conceded" themselves liable for such services on regular tours of duty, is borne out by the fact that in the 70th Congress (1928) they introduced another bill (H. R. 12103) to relieve themselves of such liability. (See App. 90.)

The offering of such an amendment leads to the natural conclusion that under the law then existing customs employees were entitled to extra compensation for services performed on regular tours of duty of eight hours, when assignments to such tours of duty included night, Sunday or holiday services, although performed within a six-day week.

A brief filed with the committee by Mr. Bond states

> "* * * the only charge being for *Sundays and holidays, days which are universally recognized in all industries to be overtime.*" (Italics ours.) (Hearings *supra*, p. 145; petitioner's brief p. 119.)

At that time, the employees were ~~required~~ REQUIRED to work seven days a week and if absent on Sundays or holidays, those days were charged against them.

What Congress decided to do about the problems that were discussed before that committee, is to be found in the plain provisions of the Tariff Act of 1922, and the normal meaning of the words there used, and not in the testimony of Mr. Bond or the "implicit" understanding of those seeking to escape the burden of the grant of additional pay.

In that act, Congress took a position which was just the opposite from that requested in those two bills, and by enacting the administrative provisions of the 1922 Tariff Act made clear its intention that when customs employees were required to work at night or on Sundays or holidays in connection with protecting the revenue at international ferries, bridges, tunnels and railroads, additional compensation must be paid them and the Government be reimbursed therefor by the transportation companies receiving the benefit of such services, so rendered outside the official hours of the customs house.

Tariff Act of 1922

The decision of this Court in the Davidson case, *supra*, was handed down on January 30, 1922, while the 1922 Tariff Act was under discussion. The Tariff Act was approved on September 21, 1922. It was a general revision of the tariff laws. That they were inadequate and needed revision had long been recognized by Congress. (Report 248 on H. R. 7456, 67th Cong., 1 Sess. 1922 Tariff Act, p. 1.)

The repealing sections of the 1922 Tariff Act are Sections 642, 643 and 644 (42 Stat. 989, 990). Two hundred

eighty-eight (288) sections of the revised statute were specifically repealed, besides many acts and parts of acts in the statutes at large. Section 644 provided that "all laws and parts of laws inconsistent with the provisions of this Act are hereby repealed."

The repealed sections included practically all of the pertinent provisions regulating the following subjects, being found in Title XXXIV of Revised Statutes in the chapter and at the pages indicated: Entry of Merchandise, c. 4, p. 539; Unlading, c. 5, p. 557; Appraisal, c. 6, p. 564; The Bond and Warehouse System, c. 7, p. 573; Payment, c. 8, p. 582; Drawback, c. 9, p. 584; Enforcement of Duty, Laws and Punishment for Violations, c. 10, p. 591; Provisions relating to commerce with contiguous countries, c. 11, p. 597. In fact, a new tariff act was created.

The effect of this revision upon the decision of this Court in the Davidson case was discussed in the Ferguson case, *infra*, at p. 41, and the Mellon case, *infra*, at page 42. In both of those cases the Court held in substance that the agencies of transportation to be affected by payment of additional compensation for night, Sunday and holiday services were redescribed in Sections 450 and 451 of the 1922 Tariff Act and made to affect all of the facilities and services here involved and that the distinction theretofore maintained in the examination of imported merchandise and passengers, their baggage and personal effects, had been terminated. The application of the act to all such facilities is not challenged, except with respect to its application to the bridge and tunnel.

Although this act repealed other sections of the Act of March 2, 1799 as carried into the revised statutes, it did not repeal Section 2 of that act (1 Stat. 706) or R. S. 2733 into which that section was carried, and which section fixed the day pay of customs inspectors on a per diem basis;

Acts of March 4, 1923 and May 29, 1928

The Act of March 4, 1923 (Ch. 251, 42 Stat. 1453; U. S. C. Tit. 19, and referred to as the Classification Act of 1923, as expressed in its title, was enacted for the purpose of providing the necessary organization of the customs service for an adequate administration and enforcement of the Tariff Act of 1922 and all other customs laws. It brought customs employees under civil service and authorized the Secretary of the Treasury, except as otherwise provided by law, to fix their compensation with a maximum increase of 30%, except as to laborers. We have no information on what action, if any, was taken with respect to this authorized increase.

By Act of May 29, 1928 (Ch. 865, S. 1, 45 Stat. 955), the base pay of customs inspectors was placed on an annual basis, commencing at $2,100.00 per annum. Since 1799 it had been on a per diem basis.

Cases Construing the Pertinent Statute

The statute has been before the courts for construction in the following cases:

International Railway Co. v. Davidson, 256 U. S. 506.

This case involved the construction of the Act of February 13, 1911, as amended by the new Section 5 in 1920, and before the Act of 1911 had been repealed by the 1922 Tariff Act. The opinion in this case is important because in discussing the meaning of the new Section 5, this Court pointed out that the new Section 5 "defined what was to be deemed overtime," and also pointed out that that Section 5 related only to the vessels and other conveyances described in the first four sections of the Act of 1911.

(Vessels and other conveyances carrying cargo and required to make entry.)

Port Huron & Sarnia Ferry Co. v. Lawson, 292 Fed. 216.

After the 1922 Tariff Act became effective, the Port Huron & Sarnia Ferry Company filed a bill to enjoin the collector at Detroit from enforcing the provisions of the act with respect to the ferries at Port Huron, Michigan, which carried vehicular traffic and foot passengers. The *Davidson* case, *supra*, was cited and relied upon. In denying the contention of the Ferry Company, the District Court held: "* * * There is no vagueness, no uncertainty in the provisions of Section 450 * * *. The requirements of the next Section, 451, * * * are equally clear." It pointed out that over 200 sections of the Revised Statutes and numerous other acts and parts of acts were repealed by the 1922 Tariff Act, together with all laws and parts of laws inconsistent with the provisions of this act.

Ferguson v. Port Huron & Sarnia Ferry Co., 13 Fed. (2d) 489.

In this case, the collector at Detroit sued the Port Huron & Sarnia Ferry Company for extra compensation of customs employees, payment of which had been withheld during the litigation in the *Lawson* case, *supra*. The suit was to recover for services performed at night, as well as on Sundays and holidays.

The Ferry Company defended on the ground that extra compensation or "overtime" was not earned until the officers had worked their regular time. The Government in that case took just the opposite position from that which it is taking in these cases. It there contended that

extra compensation was payable for night, Sunday and holiday services as such, without reference to other hours of service. The decision of the District Court is important as bearing upon the meaning of "overtime" and is hereinafter further referred to (p. 59).

Mellon v. Minn. St. Paul & S. S. M. Ry., 11 Fed. (2nd) 332, cert. denied, 271 U. S. 678.

This case involved the traffic of eleven great railway systems crossing the Canadian border at points from Maine to the Pacific Coast. The Wabash Railroad and the Michigan Central Railroad, parties to that suit, were then operating three of the facilities involved in the present cases, namely, the Wabash Slip Dock and the Michigan Central freight station and passenger station. (R. 41). The traffic involved at these stations was practically continuous and required that the revenue be protected by assignment of customs inspectors to tours of duty so as to cover practically the whole twenty-four hours of every day. The Court held that the act applied to night, Sunday and holiday services at those railway facilities.

The Davidson case was again relied upon. The Court pointed out that the first four sections of the Act of 1911 had been repealed by the 1922 tariff act and that the description of the agencies of transportation to be affected by the extra compensation provisions of Section 5 must now be found in Sections 450 and 451 of the Tariff Act. The railway companies urged that the extra compensation provisions applied only to the common carriers of bonded merchandise. The Court cited the District Court's opinion in the *Lawson* case, *supra*, and pointed out the effect of the 1922 Tariff Act and held that the act ap-

plied not only to the ferry companies carrying passengers but also to the railroads carrying passengers with their baggage across the international border.

71st Congress

Petitioner cites reference to hearings, Senate Finance Committee, 71st Congress, 1st Session, on H. R. 2667, to the effect that the carriers conceded themselves not to be liable for this extra compensation when the services were performed within a regular tour of duty, and that the Secretary of the Treasury likewise conceded such to be the case: These conclusions are deduced from the following history. In the 70th Congress (1928), the carriers, not conceding, but apparently recognizing they were liable for services performed within such tours of duty on Sundays or holidays, introduced in the House a bill, H. R. 12103 (App. 90), to relieve themselves from such liability. The bill never was reported out and was referred to Senate Committee on Finance in 71st Congress, whose hearings are extensively quoted by petitioner.

Ogden Mills, then Secretary of the Treasury, was supporting legislation to relieve carriers of such obligation, and in connection with said bill, H. R. 12103 (70th Congress), wrote a letter on the subject bearing date of April 9, 1928 (Hearings *supra* p. 10278). The real effect of the bill was to release carriers from liability when service was to be performed on such tours of duty. It is such "concessions," so made by the carriers and approved by Mr. Mills, that petitioner relies upon in support of its theory, that although Congress refused to pass such legislation, nevertheless it had the effect of imputing to Congress, in the enactment of the 1930 Tariff Act, the legislative approval of the practices so "conceded."

The relief sought to be obtained for the carriers by H. R. 12103 in 70th Congress *(supra)* was embodied in H. R. 2667 and introduced in both the House and Senate in the 71st Congress.[1] The bill was referred to House Committee on Ways and Means and to Senate Committee on Finance, and both committees conducted hearings. The hearings before Senate Committee on Finance, cited extensively by petitioner, represents the efforts of the carriers to relieve themselves from such liability, and the references cited by petitioner should be read with that in mind.

The bill (H. R. 2667) sought to accomplish the purpose of the carriers by an amendment to Section 451 of the Tariff Act, which would specifically exclude from the extra compensation provisions of the act, services in connection with bridges, funnels and ferries at the frontier ports. Mr. Bond again appeared in behalf of customs employees at the seaboard ports, accompanied by Mr. Brandon, counsel for his organization. It is information alleged to have been gleaned by members of Congress from the statements at those hearings, upon which petitioner relies in his theory of legislative approval.

The House Committee made a report and recommended the proposed legislation.[2] The gist of the report was that under the law, customs employees were entitled to extra compensation for overtime services in connection with railroad trains, ferry boats, international bridges or tunnels, and recommended that those facilities be relieved of such obligation. The Senate committee failed to report out the bill and it never became law.

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[1]The bill appears at p. 529, Hearings Senate Committee on Finance, 71st Cong., 1st Sess., on H. R. 2667, Vol. XVII.

[2]Report No. 7 to accompany H. R. 2667, 71st Cong., 1st Sess., p. 70, and the amendment as voted by the House on p. 213 id.

Statements made before those committees still leaves in doubt the practices then existing with respect to Sunday and holiday pay, that is, as to whether payment therefor was being made because the work fell within the grant made by Congress, for additional pay for Sunday and holiday work, or whether it was being paid for services in excess of 48 hours per week. The fact that it was being paid is not disputed except at the bridge and tunnel which were not then operating. The regulations of the Secretary of the Treasury requiring customs employees to work seven days a week were in effect, and if they did not work on Sundays or holidays, they were charged back for those days. (See 1915 regulations, App. 82.)

Also it is to be noted that this Court had already defined the word "overtime," and that definition became a part of the 1922 Tariff Act; that the District Court of the United States had construed the word "overtime" in the *Ferguson* case, *supra*, in which it adopted the definition placed upon that word as then urged by the Secretary of the Treasury; that the liability of the additional pay had been litigated by eleven great railroads, whose facilities crossed the Canadian border, resulting in the *Mellon* case, *supra*, in which it was held that night, Sunday and holiday services in connection with the traffic on those railroads, much of which was being performed on tours of duty covering 24 hours per day, fell within the grant of additional pay.

We suggest that it is more reasonable to conclude that by enacting the administrative provisions of the 1922 Tariff Act into the 1930 Tariff Act, while at the same time denying the insistent demands of the carriers to be released from liability. Congress approved the law of the Davidson, Ferguson and Mellon cases and the regulations of the Secretary of the Treasury, issued for the guidance

and control of the Bureau of Customs, rather than the illegal practices, which those committes were informed, existed.

It is to be noted, also, that the grant of night, Sunday and holiday pay made by the 1922 Tariff Act was not impaired by that Congress, but on the contrary the provisions for its enforcement were extended so that the drastic penalties for its violation were made to include the unlading of passengers, in violation of the act (19 U. S. C., s. 1454; 46 Stat. 716), which penalty had been omitted from the 1922 Tariff Act, although made unlawful by that act.

75th Congress (Customs Administration Act, 1938)

Petitioner cites statements regarding the then existing practices, made before House Committee on Ways and Means and Senate Sub-committee of Committee on Finance, 75th Congress (1938) in further support of its theory of legislative approval. H. R. 6738 was introduced in the House by Mr. Dalton at the request of the Treasury Department which had access to legislative process. The synopsis submitted with the proposed bill stated its purposes and effect to be to provide payment of overtime compensation for the few cases then not affected by the overtime provisions of the customs law (p. 35 House Hearings, *supra*). A distinguished group of counsel appeared before that committee in support of the proposed bill. They were Messrs. Clinton M. Hester, Assistant General Counsel, and William R. Johnson, Chief Counsel for the Bureau of Customs, and Stephen J. Springarn from the office of the General Counsel of the Treasury Department. No one appeared for or on behalf of customs employees whose compensation was at stake.

Questioning as to the purposes of the legislation brought the further information that it sometimes happened that

merchandise leaves or comes into the country otherwise than by a vessel or vehicle, such as the driving of cattle across the border. In order to permit the drivers of the herds to use the highways at night time, it was necessary to assign customs inspectors to that duty and the proposed bill would enhance the interests of customs employees by including those services within the grant of additional pay. Hearings, id. 87, 89.) Also, it was to affect any other merchandise brought into the country under such conditions. It was to benefit customs employees that the legislation was sought.

The provisions of the bill appear at App. 93. We herewith paraphrase certain portions of that bill which would affect all of the services here involved in order to more clearly demonstrate its true purport.

> "Upon a request made by * * * a common carrier * * *, for the services of customs officers or employees at night or on a Sunday or holiday * * *, the collector shall assign available customs officers or employees in accordance with the request to perform any services which may lawfully be performed by them during regular hours of business * * *. *If qualified customs officers or employees on regular duty are available to perform the requested services, they shall perform such services without extra compensation.*" (Italics ours.)

We now find that the bill, introduced by the Treasury Department for the purpose of providing additional pay in connection with the movement of cattle across our borders on highways at night and otherwise for the benefit of customs employees, turns out to be a means of extinguishing the grant of additional pay which the carriers had been unable to accomplish in the Mellon case and before the 67th, 70th and 71st Congress.

The question apparently arose in the mind of Representative Dingell as to why the last sentence (liability termination clause) in the proposed bill was necessary which eliminated such extra compensation, if no such liability therefore then existed.

And Mr. Johnson explained (Hearing, *supra*, p. 89):

> "Mr. Johnson: Those provisions complete the thought and take care of the situation where we do have regular tours of duty outside of usual office hours of the port."

It was brought out that payment for night, Sunday and holiday work at the ferries had been stopped because it was not to be paid at the Ambassador Bridge. Mr. Dingell charged that any such practice had not been authorized by Congress (Hearing, *supra*, p. 89). That bill was not reported out, but in changed form was passed by the House and was introduced in the Senate as H. R. 8099 and referred to Sub-committee of the Committee on Finance and hearings had therein.† The "liability termination" clause with which H. R. 6738 concluded, was omitted and in its place appeared the "Public Interest Proviso," so-called, with which Section 451 now concludes, and upon which petitioner further relies in its theory of administrative approval.

It is claimed by petitioner that statements were made before the Senate committee, which in effect, conceded that the extra compensation provisions of the act were not applicable to the bridge or tunnel (Petitioner's Brief, p. 61) and that the Treasury Department made the same representations, although the practices of the Bureau of Cus-

†Hearings, Sub-committee of Senate Committee on Finance, on H. R. 8099, 75th Congress, 3rd Session.

toms then in force suggested a different conclusion. Inferentially at least, the Bureau acknowledged that the bridge and tunnel came within the grant of Sunday and holiday pay by compensating employees for work on those days by granting them compensatory time off (see Testimony of Petitioner, R. 70) and by proposing a bill in Congress by which that liability could be terminated. If the bridge and tunnel were not affected by the provisions of the Tariff Act, "compensatory time off" would be unnecessary.

Public Interest Proviso

The history of this proviso shows clearly why it was introduced and enacted.[1] It appears from that record that Mr. Eli Frank, Jr., counsel for National Customs Service Association, was the person who introduced the working proviso, and that it was introduced by him in the House in connection with another amendment there introduced by him, which would prohibit the practice of compensatory time off such as was then in use at the bridge and tunnel in Detroit, whereby customs employees were required to work on Sundays and holidays and be compensated therefore by time off during the week. In the words of the proposed amendment, the collector would have no authority "to make assignments to regular duty on Sundays or holidays * * * in the place of assignments to regular duty on other days or nights."

The Treasury Department objected to the proposed amendment on the ground that it challenged their general authority to make assignments to duty on Sundays or holidays. As Mr. Frank stated (Hearing, p. 60):

> "In order to make certain that such authority in the Department was to remain unimpaired, the last

[1] Hearings, Sub-committee of Committee on Finance Finance, 75th Congress, 3rd Session on H. R. 8099, p. 59.

sentence of the present section 8 was inserted as follows:

> 'Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular duty at nights or on Sundays or holidays when such assignments are in the public interest.'" (This is the Public Interest Proviso [saving clause].)

When the bill passed the House, the challenging portion of the bill was deleted, as was the "liability termination" clause of the bill introduced by the Treasury Department, but the saving clause (public interest proviso) as introduced by Mr. Frank was retained and appeared in the bill (H. R. 8099) in the place of the "liability termination clause" which the House refused to pass.

Thus, it conclusively appears that the plan and purpose of the Public Interest Proviso when introduced by Mr. Frank, was in the nature of a saving clause against the impairment of the authority of the Secretary of the Treasury to assign customs inspectors to duty. It was not for the purpose of limiting in any way the rights of Customs employees. No one was challenging the authority of the Secretary of the Treasury. All of the rights mentioned in the Public Interest Proviso had been exercised by him since May 8, 1792 (2). His authority was not being impaired.

The purpose of H. R. 8099, as introduced in the Senate, is described in the synopsis of its provisions which appears on p. 13 of said hearings *(supra)*, from which it appears that its principal purpose was to increase the sweep of the grant of night, Sunday and holiday pay to include such services as were not theretofore covered, such as the case of livestock driven into the country.

From the debates in Congress on this bill, it appears that the purpose and effect of the bill was to permit the

Treasury Department, if it saw fit, to bring bridges and tunnels within the sweep of the grant of night, Sunday and holiday pay (81 Cong. Rec. 9391). It was represented that the grant of extra pay did not then apply to such facilities, because of the decision in the Davidson case *(supra)*, by this Court. The fact that these suits had been filed (Sept. 29, 1937), and were then pending, challenging that construction of the act by the Department, was not brought to the attention of Congress, and the bill was enacted by Congress into law on the belief that it was bettering the status of customs employees, and with no thought, whatsoever, that the legislation so proposed by the Treasury Department would be turned against the very persons whose interests they were supposedly advancing.

Certainly, anyone examining the provisions of that Public Interest Proviso in itself can find nothing therein which would in any manner increase the authority granted to the Secretary by Act of May 8, 1792. The proviso gave the Secretary no power to make assignments to duty at night or on Sunday or holidays without extra compensation, nor to interfere with the pay of customs employees which had been granted by Congress. The effect to be given to this proviso, by petitioner, is the same as the effect of the liability termination clause, *supra*, would have been had not Congress refused to pass it. We suggest that circumstance, in itself, precludes any legislative approval of the practices which Congress so specifically refused to approve.[1] We suggest that if the theory of legislative approval is to be applied to the action of Congress in the 75th Congress, it tends to disprove and not to support petitioner's theory of the meaning of overtime services.

[1] "Amendments made, or proposed and defeated, may also throw light on the construction of the Act as finally passed and may properly be taken into consideration." Lewis Sutherland, Stat. Const., 2 Ed., S. 470, p. 880.

Administrative Practices and Legislative Approval

Analyzing the legislative history relied upon by petitioner, we find that it amounts to nothing more than statements made to several committees informing the members that overtime was not being paid for night services when performed on regular tours of duty, although two bills had been introduced in Congress to terminate the liability for such services.[1] Also that it was being paid for Sunday and holiday services. Except as to the 75th Congress, the bills considered by the committees never reached Congress.

However, there is no evidence that Congress was influenced in any manner whatsoever by the statements relied upon. In fact the evidence points to the contrary. Respondents contend that the probative value of those statements is nil, and that there is no evidence of an intention on the part of Congress to depart from its steadfast purpose of maintaining the grant of additional pay.

The limitation as to the use of such statements is expressed in the case of *U. S. v. Trans. Missouri Freight Assn.*, 166 U. S. 290, 318.

The Secretary of the Treasury never issued any regulation adopting the alleged practices of the Bureau of Customs. As a matter of fact, under the published regulations it was necessary for the employees to work on Sundays or holidays, or those days would be charged against them.

The effect of a practical construction must be in a matter so important and so long continued, that the Legislature would presumably have knowledge of it. *Lewis*

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[1]Amendments made, or proposed and defeated, may also throw light on the construction of the Act as finally passed and may properly be taken into consideration." Lewis Sutherland, Stat. Const., 2 Ed., S. 470, p. 880.

Sutherland, 2nd Ed. Vol. 2, p. 782. We suggest that the cases before the Court are controlled by

U. S. v. Dickson, 15 Peters (U. S.) 141, 161 and *Koshland v. Helvering*, 298 (U. S.) 441, 446, 447.

In the Dickson case the uniform construction of an Act of Congress made by the Treasury Department over a period of years from 1818 to 1834, was struck down as not in conformity with the act upon which it was based.

In the Koshland case a regulation issued by the Treasury Department under the 1921 Revenue Act, although of long standing and universally acted upon, was struck down because the regulation was not justified under the statute.

IV.

MEANING OF "OVERTIME SERVICES"

Respondents contend, that as used in the pertinent statute, the words "overtime services" were intended to, and do, mean those night, Sunday and holiday services which were to be reimbursed to Government and which were to be performed outside of the Customs House hours of a port when free customs service is available.

It is not necessary to look beyond the plain wording of Section 5 to find the meaning of the words "overtime services." The statute clearly provides that services performed at night and on Sundays and holidays shall be deemed to be "overtime services." The fact that no other standard is fixed in the act supports that conclusion. The Court of Claims did not need to go beyond the plain meaning of the words of that section to reach its conclusion. Neither did the Court in the Ferguson case *(supra)* nor this Court in the Davidson case *(supra)*. The meaning of "overtime services" in every regulation issued by

the Secretary of the Treasury has followed the definition of the statute.

Act May 8, 1792, 1 Stat. 280, R. S. 249, Title 19, U. S. C. s. 3 vested authority in the Secretary of the Treasury to superintend the collection of duties on imports. Under that statute and its successor, classification act of 1923 (Act March 4, 1923, s. 2; c. 251, 42 Stat. 1453; tit. 19, U. S. C., s. 6) he was given and exercised broad powers in requisitioning the services of the outdoor force of customs employees, and under that statute it always has been and is now conceded that he may require customs employees to work during any number of hours per day which he may fix and for 365 days per year.

Customs regulations always have reserved the right of the Secretary to require long hours of service. The regulations have uniformly provided for official hours of business during which customs offices are open and has excluded Sundays and holidays from those hours. The field force, however, does not work within those offices and their hours of service are regulated under a different part of the regulation which sets up the official hours for certain employees. The official hours of the field force herein involved are prescribed by Article 1462 (b), (App. 82). However, the Secretary reserves the authority, by sub-section (c) of that article, to extend these hours without extra compensation, except as affected by the grant of additional pay.

In practice, customs employees always have been required to work long hours, sometimes working all night after having worked the previous day and then reporting again for duty on the following day and without extra compensation except when the services were affected by the grant of additional pay.

Prior to Act of May 29, 1928 *(supra)* the pay of customs employees was fixed on a per diem basis "for days actually

worked in aid of the customs." They were required to work on Sundays and holidays in order to earn their base pay. If they did not work on Sundays and holidays those days were either charged against them or charged against their annual or sick leave. Likewise absences for fractional days were charged against them (1915 Reg. App. 82).

The pay of customs employees is, and always has been, fixed by statute. The Secretary never has been vested with authority to pay overtime, within the meaning of that word as contended by petitioner, nor was the Secretary ever vested with any authority to define what should constitute overtime. Congress chose to, and did, define the meaning of that word in the new Section 5 and no other definition has ever been given. It is there defined as services performed between 5 p. m. and 8 a. m. and on Sundays and holidays. Congress also fixed the rate of pay for that overtime and it was illegal for the Bureau of Customs to compensate the employees at Detroit by granting them "lieu" days for Sunday and holiday work.

The only additional pay or other compensation which the employee may receive is that which is fixed by statute. Under such a statute "overtime" as contended by petitioner becomes impossible.

Universal Acceptance of Extra Pay for Work on Sundays and Holidays

In most industries, if an employee works on a Sunday or a holiday he is entitled to extra pay. Such always has been, and now is, the universally accepted practice. The standard union contracts of today provide for the payment of overtime for Sunday or holiday services as such, except as temporarily affected by wartime legislation or regulations. In the pertinent legislation, Congress steadfastly protected that right for customs employes. Work

on Sundays and holidays is in truth and in fact "overtime." (*Ferguson v. Port Huron and Sarnia Ferry Company*, 13 Fed. (2nd) 389, 494.) In this statute "night" services are placed on the same footing as Sunday and holiday services.

That the grant of additional pay was not connected with the necessity of prior hours of servi , appears conclusive from the pertinent legislative history. The conditions under which Congress intended that extra compensation should be paid is expressed by it in apt language in each succeeding grant, and is there expressed in terms of services performed at night or on Sundays or holidays.

That such must have been the intent of Congress also is evidenced by the mandate of the statute requiring that a special license must be obtained and bond filed in every case of unlading at night, or on Sundays or holidays from the carrying vessel or vehicle. If those services are not to be affected it requires the performance of the useless burden of securing a special license and filing a bond.

It is true that payment is required to be made in accordance with the provisions of Section 5. But that section can have no greater effect than a proviso, and should be strictly construed so as to take nothing out of the enacting clauses of the Tariff Act which does not fall fairly within the terms of the proviso (see *infra* p. 70). There is nothing in Section 5 which can be construed to deprive customs employees of the substantial rights held by them since 1799 and continued in effect by Sections 450 and 451 of the Tariff Act.

"Overtime Services" Used to Denote Night, Sunday and Holiday Services

By comparing the wording of the old and new Sections 5 it becomes clear that the words "overtime services" were

used in the new Section 5 in substitution for the words "night services" in the old Section 5, when it became appropriate to include within the sweep of "overtime services" Sunday and holiday services as well as night services.

We here set out the appropriate words as used in both sections, the words in plain type being those used in the old Section 5 and retained in the new Section 5, those in brackets being words used in the old Section 5 and deleted in the new Section 5, and those in italics appearing for the first time in the new Section 5, viz.:

> "The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [night] *overtime* services of inspectors * * * *who may be required to remain on duty between the hours of five o'clock post-meridian, and eight o'clock ante-meridian, or on Sundays or holidays, to perform services* in connection with the lading or unlading of cargo [at night] * * *"

In the old Section 5 the words "night services" were used synonymously with services "in connection with the lading or unlading of cargo at night * * *." But when it became expedient to use language in the new Section 5, properly describing Sunday and holiday services as well as night services, it became necessary to delete the word "night" and to use in substitution therefor a word which would appropriately describe not only night services but Sunday and holiday services as well.

So we find in the new Section 5 that the words "night services" are replaced by the words "overtime services," and likewise that the phrase

> "in connection with the lading or unlading of cargo at night * * *"

has been replaced by the phrase

> "duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo * * *."

Just as in the old Section 5, the words "night services" were used synonymously with services "in connection with the lading or unlading of cargo at night," so the words "overtime services" in the new Section 5 are used synonymously with "duty between the hours of five o'clock postmeridian and eight o'clock antemeridian or on Sundays or holidays * * *, in connection with the lading or unlading of cargo." Thus it is clear that the words "overtime services" were used in the new Section 5 to denote "night, Sunday and holiday services."

Petitioner would lead us to believe that Congress intended to impair the grant of additional pay, which had been safeguarded for one hundred and twenty-one years, simply by substituting the words "overtime services" for the words "night services" under the conditions hereinbefore cited. Certainly if Congress had intended to change its policy with respect to that grant, it would have used apt language to express that intention instead of using language the normal meaning of which prohibits such an interpretation.

When the new Section 5 was before this Court for consideration in the Davidson case, the Court stated that Section 5 defined what should be deemed to be overtime. There being no definition of "overtime" in the statute, other than the night, Sunday and holiday hours therein specified, we must conclude that the new Section 5 gives its own definition of "overtime" to be those hours of service so specified in the statute. The 1922 Tariff Act was under consideration in Congress when that opinion was handed down. The definition of "overtime" as given by

this Court in the Davidson case, was adopted by Congress in the administrative provisions of the 1922 Tariff Act. When Congress enacted that act, that it had in mind the opinion of this Court in the Davidson case *(supra)* cannot be denied. Evidence of this is in the definition given the words "vessel" and "vehicle" after this Court had placed a limitation on the words "vessel or other conveyance" as used in the old Section 5.

When Congress incorporated the new Section 5 into the 1922 Tariff Act by reference, without any change in its construction, it is presumed to have adopted the meaning given by this Court to the word "overtime" in the Davidson case, and that definition then became a part of the Tariff Act.

Latimer v. United States, 223 U. S. 501, 504.
Sessions v. United States, 145 U. S. 29, 42.

In this connection it is to be noted that in the definition section of the Tariff Act (Sec. 401, 46 Stat. 708; U. S. C., tit. 19, sect. 1401) appears no definition of "overtime," although definitions of all other important words used in the statute appear therein. The question naturally arises, why was the definition omitted for such an important word as "overtime"? The answer is clear and conclusive. This Court had already defined what was deemed to be "overtime" in Section 5 and Congress was satisfied with that definition. Otherwise, it would have changed that definition.

Definition in the Ferguson Case (supra)

The meaning of the word "overtime" was squarely at issue in the above case. Here, the collector sued the Port Huron and Sarnia Ferry Company for night, Sunday and holiday services of inspectors. The defense urged was

that they had not first performed their regular hours of service. The Government took just the opposite view in that case that it has taken in these cases. It there maintained that overtime was payable for night, Sunday and holiday services as such, without reference to other hours of service.

The contention of petitioner that the services there performed were Sunday services in excess of a weekly schedule is refuted by the defense there raised, viz., that regular hours of service must first be performed before overtime is earned.

In that case, the District Court used the following language:

> "It is claimed by defendant, and denied by plaintiff, that 'overtime pay' is not earned, on any particular day, within the meaning of this statute, unless the officer seeking such overtime pay has first earned his regular pay for such day by working during the regular hours on that day; that is, in the words of defendant in its brief, 'to be entitled to "overtime" the inspector must first have given his contract, or normal time of eight hours--otherwise, there could be no "overtime."' I cannot agree with this contention. Congress could easily have used language in the statute which would have expressed such an intention, but it has not done so. The term 'overtime' appropriately expresses the meaning, and in my opinion was intended to express such meaning: 'Beyond the regular, fixed working hours.'"

Meaning of "Remain on Duty"

Petitioner cites the use of the words "remain on duty" as used in new Section 5. Those words did not appear in the old Section 5, nor in the Act of March 3, 1873, but were used in the new Section 5 for the first time. They

were so used in connection with the amendment in the new Section 5 which terminated a prior abuse to which customs employees had been subjected by their being required to report for duty, and in many instances, being obliged to wait many hours for the arrival of a vessel, and then were not paid the additional compensation unless the vessel arrived and the unlading actually took place* (*supra* p. 31).

It is clear that the words "ordered to report for duty" used in Section 5 mean the same as the words "assigned to duty" as used in Section 451. The words "assigned to duty" and "ordered to report for duty" have the same meaning and both designate the starting time from which the customs employees are to "remain on duty."

The words "remain on duty" as so used in Section 5 cannot have the effect of creating new conditions to be attached to the grant of additional pay which had not been impaired since 1799. The divesting of any rights then existing should not be permitted by the use of such language.

But those words, even if given the significance suggested by petitioner, could not have any reference to Sunday and holiday duty, but would be restricted to night duty. One comes back to work on Sundays and holidays after having gone home for the night. One does not "remain" on duty in order to work on those days. In the pertinent statute, night duty is placed in the same category with Sunday and holiday duty.

If the Court should hold that respondents are entitled only to Sunday and holiday pay, there will then arise the method of computation of that pay. Under present prac-

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*Cong. Rec. Vol. 59, part 2, 66th Cong., p. 2171, App. 101.

tices, the nine-hour period between 8 a.m. and 5 p.m. only is credited to Sunday and holiday duty. The hours on Sundays and holidays between 12 midnight and 8 a.m. and between 5 p.m. and midnight are credited to night duty. In this connection, we point out that in H. R. 6577, as introduced by the Treasury Department in 66th Congress, and which subsequently became the new Section 5, that Sunday duty was limited to the period from 8 a.m. to 5 p.m.* However, that limitation was stricken, thus evidencing an intent that the 24 hours of Sundays and holidays should be credited to duty on those days.

Results of Petitioner's Construction

By reading something into the act not expressed therein, petitioner's construction:

1st. Violates the purpose of the legislation which for 121 years prior to 1920 had included in the grant of additional pay the night, Sunday and holiday hours of customs employees for lading or unlading cargo from vessels.

2nd. Strikes down the universal concept that one must not be required to work on a Sunday or a holiday without extra pay.

3rd. Defeats the purpose of the act, which was to raise the pay of customs employees as a class, and who admittedly were much underpaid; and whose financial condition required a substantial raise in pay.

4th. Fails to facilitate lading or unlading at night, but actually tends to detract therefrom by requiring customs employees to give up their night, Sunday and holiday time for that purpose without extra compensation.

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* *See copy of bill in Hearings, Sub-Committee on Ways and Means, on H. R. 6577, 66th Cong., 1st Sess., p. 3.

5th. Forces upon customs employees the hardship of switching their sleeping hours from one shift to another without extra compensation. Being obliged to work from 12 midnight until 8 a.m., and then to be switched from 8 a.m. to 5 p.m., and then again from 4 p.m. to midnight, disturbs the normal way of life and is not conducive to good health, and prevents proper companionship with family and friends. Such work is entitled to extra pay.

6th. Leads to an unreasonable result, in that the customs inspectors at the seaboard ports receive the increase in pay which Congress provided for all customs employees as a class, while the employees at the frontier ports are denied that increase under the guise of compensating them by lieu days instead of the additional pay granted by Congress.

7th. Leads to an unreasonable and absurd result conflicting with the history and purpose of the act with respect to Sunday service. The statute provides for two days extra pay for being called to Sunday work regardless of the amount of time involved. Under petitioner's construction one working for one-quarter hour on Sunday for a total of 44¼ hours per week, receives the two additional days pay for the ¼ hour of Sunday work, while another, working 8 hours on Sunday for a total of 44 hours per week receives no additional pay.

Results of Respondents' Construction

By giving to the language used its normal meaning, respondents construction leads to the following results:

It facilitates lading and unlading at night and on Sundays and holidays, by providing such a rate of additional pay for the employees which Congress deemed suitable to pay them in order to stimulate their interest in and compensate them for performing the necessary work.

It accomplishes one of the principal purposes of the new Section 5, which was to provide a substantial increase in the then existing grant of additional pay. It accomplishes that purpose without any discrimination between seaboard ports and frontier ports.

It conforms with the universal concept that Sunday and holiday work is to be compensated by extra pay.

It produces results which conform with the history and purposes of prior legislation effective since 1799 affecting the grant of additional pay.

Regarding Amounts Due

The petitioner contends that an unreasonable result is reached under the construction of the act by the Court of Claims, in that the amount of extra pay earned by respondents is unreasonably large. We must take into consideration the fact that these employees come from an intelligent class; that they must maintain a high standard of appearance and be qualified to deal with the public; that the protection of a large volume of the revenue of the United States is placed in their hands under conditions where absolute integrity is necessary; that many of them had received no increase in pay during a period of 56 years and that others had received only an increase of one dollar a day above the rate of 1864.

That the statute was passed in the light of the admitted necessity for a substantial raise in pay for Customs inspectors; that the services for which extra pay was to be given were to be performed for the benefit of private interests and outside of the regular Custom House hours of the port during which free customs service was available, and that the United States was to be reimbursed for the additional pay from the transportation companies re-

ceiving the benefit of such services. Under such circumstances, it is not for the Bureau of Customs nor the Courts to say that the amount of extra compensation to be earned is too much or too little. That is a matter for Congress alone to decide and if the results are not satisfactory, the remedy is in Congress and not in requesting the Courts to resort to judicial legislation to terminate the total extra pay so clearly provided by Congress.

Under the manner in which the act was administered by the Bureau of Customs, it is possible that respondents will receive more than they would have received if the regulations issued by the Bureau of Customs had been complied with, which required assignment to duty at night and on Sundays and holidays to be spread throughout the whole force, so as to equalize the additional pay among all of the employees.

Again, the night, Sunday and holiday traffic at Detroit has multiplied since 1922 because of the tremendous increase in automobile traffic, and also because facilities, such as the Ambassador Bridge and the Detroit and Canada Tunnel, have been added in order to take care of the traffic. This necessitates a large increase in the number of night, Sunday and holiday shifts that are required to be performed in order to protect the revenue. Extra compensation resulting from traffic during 1931 to 1937 under those conditions would necessarily exceed the amount of extra compensation that would have resulted from the traffic in 1922.

Such results arising from change of conditions, or from an unlawful administration of an act, do not fall within the class of "unreasonable results" contemplated to be used as a basis or reason for the necessity of construing statutes. The fault in such cases does not lie in the statute, but in subsequent events not contemplated and

in the unlawful execution of the provisions of the statute, and therefore afford no basis for resort to extrinsic aids in the construction of the statute.

In order to justify resort to construction of statutes there should be something to make plain the intent of Congress that the letter of the statute is not to prevail.[1] Nor is it enough that hard or objectionable consequences result, which were not within the contemplation of the framers of the act. Many laws, when put to the test, produce results very different from those contemplated, but such results constitute no basis for looking beyond the language of the statute.[2]

Also, we suggest the application of the doctrine that in cases involving the pay of Government employees, where the words of the statute admit of two interpretations, the construction ought to be favorable to the claims of the officer who performs the duties. *United States v. Bassett*, 2 Story 389; *United States v. Coltier*, 3 Blatch. 333; *United States v. Morse*, 3 Story 87, Fed. Cases No. 15,820; *Moore v. United States*, 4 c. cls. 141, 165; *Butler v. United States*, 23 c. cls. 162; *United States v. Averill*, 4 Utah 527. But some question is thrown on this doctrine by *United States v. Clough*, 55 Fed. 373. But the decision in the latter case might be distinguished because it involved a fee system which the court stated had been the subject of abuses.

V.

WORKING HOUR PROVISO

With respect to the working hour proviso, so called, with which Section 5 concludes, the construction of that proviso

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[1] *Treat v. White*, 181 U. S. 264, 268.

[2] *Crooks v. Harrelson*, 282 U. S. 55, 60.

as contended by petitioner, is specifically prohibited by the language of the proviso. That proviso was added to the proposed amendment on the floor in Committee of the Whole at the time of the passage of the act. The amendment was offered by Representative Dupre from Louisiana to eliminate confusion which might arise by the administration of the act at the port of New Orleans.

He pointed out that the services of longshoremen were necessary in connection with lading and unlading and that the Union hours of longshoremen at New Orleans were from 7 a.m. to 4 p.m., and which would create a "hiatus" with respect to the hours from 7 to 8 a.m. and from 4 to 5 p.m. The purpose of the amendment was to permit the collector of a port to be able to conform the Custom House hours of the port, during which free customs service was available, to the hours of employees in other industries whose services might be necessary in the unlading, such as longshoremen.

In the appendix, at p. 94, appear the statements made on the floor in Committee of the Whole at the time the amendment was made and passed, which leave no doubt as to the purpose and scope of the proviso. Mr. Treadway, the manager of the bill for the Treasury Department, clearly stated the purpose of the amendment as follows:

> "Mr. Treadway: As I understand it, it is simply to conform the hours in the lading and unlading of vessels and the Custom House hours at that port."

Never before had Congress ever passed any legislation extending free customs service for the unlading of vessels or conveyances beyond the usual Customs House hours of a port, and there is nothing in this amendment to suggest any possible intention to terminate that practice.

It is also to be noted that Mr. Dupre stated at the time of the offering of the amendment that he was protecting the overtime pay of customs employees by adding a protecting clause to the proviso. That protecting clause is as follows:

> "But nothing contained in this section shall be construed in any manner to affect or alter the length of a working day or the overtime pay herein fixed."

The protecting clause of that proviso is two-fold. One mandate is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees * * *."

The other mandate of the protecting clause is that:

> "Nothing contained in this proviso shall be construed in any manner to affect or alter * * * the overtime pay herein fixed."

The length of the working day for customs employees which could not be affected or altered by the collector is the nine-hour period during which the Customs House was open for business and no extra compensation could be earned. The collector was prohibited from affecting or depriving the customs employee of the right to earn extra compensation during the remaining fifteen hours of the day.

Likewise, "the overtime pay herein fixed," and which is not to be altered or affected by the collector, is fixed in the enacting clause of the statute as extra compensation to be paid for services performed during Sundays and holidays and a period of fifteen hours on week days, during which free customs service was not available. There is no other overtime pay fixed in the statute so that this phrase "overtime pay fixed" cannot possibly refer to any-

thing else. The collector is thus expressly prohibited from interfering with the rights of customs employees to earn extra compensation by performing services on Sundays and holidays and during a similar fifteen-hour period of week days.

The right vested in the collector is the right to regulate hours of service and he is expressly prohibited from regulating the more important item of extra compensation. In order to permit the collector to interfere with such extra compensation, it is necessary to read into this statute something not expressed therein, but which, on the contrary, is expressly prohibited by the terms of the act. Had Congress intended to permit the collector to assign customs employees to duty at night or on Sundays or holidays without extra compensation, or to require such services to be performed without the special permit required to be obtained by the parties in interest, certainly Congress would have used apt words to that effect instead of language whose normal meaning prohibits such a construction.

The right to regulate the general working conditions of customs employees is vested in the Secretary and not the collector. But neither the Secretary nor the collector have the right to impair the grant of additional pay made by Congress. Giving the authority to the collector, as contended by petitioner, enables him to regulate the additional pay, which Congress already had fixed.

Furthermore, this proviso must now be construed with reference to the paramount provisions of the Tariff Act which specifically defined the words "day" and "night." As so defined they are a guide to the hours during which additional pay is to be earned or not earned, and so the word "day," as used in the proviso, must be limited in its

application to a nine-hour period and the word "night" must be limited to a period of fifteen hours in order to conform with the terms and purposes of the Tariff Act. Any construction by which the word "day" is made to include the twenty-four hours of the day, therefore, conflicts with the paramount provisions of the Tariff Act.

It is further suggested that the phrase "prevailing working hours of a port" could not, under any circumstances, refer to Sunday and holiday hours without some special reference thereto.

Effect of Provisos

We suggest that the mandates of Sections 450 and 451 of the Tariff Act which require a permit and bond for the performance of the night, Sunday and holiday services (not overtime services) raises a presumption that those services are to be compensated by extra compensation. Such presumption appearing in the general enacting portions of the statute should be given full effect and not limited by any subsequent provisions of the act unless the restricting clauses are clear and unambiguous. The effect of the words "overtime services" as used in Section 5 could not exceed that of a proviso. The doctrine today still remains as stated by Justice Story of this Court in *United States v. Dickson*, 15 Pet. U. S. 141, 165, and from which we quote:

> "We are led to the general rule of law which has always prevailed, and become consecrated almost as a maxim in the interpretation of statutes, that where the enacting clause is general in its language and objects, and a proviso is afterwards introduced, that proviso is construed strictly, and takes no case out of the enacting clause which does not fall fairly within its terms."

See also:

Lewis Sutherland Stat. Const., 2nd Ed., Volume 2, p. 674.

Meaning as Controlled by the Davidson Case

But the scope of that proviso has been construed in effect by this Court in the Davidson case *(supra)*. That decision controls the sweep of this proviso to the same extent that it controlled the sweep of the extra compensation provisions of the new Section 5. In that case, this Court clearly pointed out that the provisions of the new Section 5 related only to the agencies of transportation described in the first four sections of the act of February 13, 1911 *(supra)*. They related only to vessels and other conveyances carrying cargo and arriving at a port. Therefore, the working hour proviso, being but a part of Section 5, could not relate to the frontier traffic with respect to which the Bureau of Customs has applied its provisions in clear violation of the act.

It is only the rights held under an adopted statute at the time of its adoption which are granted by the adopting statute.[1] Such seems to be the rule established by this Court in cases of adoption by general reference[2] and the same rule should apply in cases of adoption by specific reference.

This construction conforms with the clearly expressed purpose of the proviso, which was to take care of the situa-

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[1]*Lewis Sutherland Statute Construction*, 3d Ed. Vol. I, p. 393; Id. Vol. II, p. 548 and case cited.

[2]*Kendall v. U. S.*, 12 Pet. (37 U. S.) 524, 526 headnote; *In re Heath*, 144 U. S. 92; *Panama Railroad Company v. Johnson*, 264 U. S. 375, 391, 392.

tion with respect to the longshoremen at the port of New Orleans, whose duties were performed in connection with vessels carrying cargo and making use of that port. As then used it would not apply to the platoon system.

It is not claimed that any regulations were ever published carrying into effect the interpretation of the working hour proviso as contended by petitioner. But if any such regulations had been issued, they would be of no effect under the well established doctrine that any regulation creating a rule out of harmony with the law upon which it is based is a nullity; *Manhattan General Equipment Co. v. Commissioner of Internal Revenue,* 297 U. S. 129 on p. 134; *Miller v. United States,* 294 U. S. 435, pp. 439-40. By the collector's alleged right to regulate "hours" petitioner claims that the collector at Detroit is vested with authority to make a vast number of regulations, partially enumerated as follows:

1. To differentiate between the vehicular ferries and railway car ferries, by relieving the one from the obligation of extra compensation, and requiring the other to pay.

2. To require payment of extra compensation at the passenger station of the Michigan Central Railroad, and to relieve the freight station of the same company from such payment.

3. To eliminate competition between vehicular ferries on the one side, and the Ambassador Bridge, Detroit & Canada Tunnel on the other side. All of whose facilities accomplished the same purpose.

4. To eliminate payment of extra compensation at the freight station of Michigan Central Railway and to require payment at the freight stations of Grand Trunk, Wabash and Pere Marquette Railways.

5. To increase or diminish the additional pay at any or all of the stations at Detroit involved in this suit as he saw fit.

It is perfectly obvious that no such vast powers were intended to be, or were given to the collector under that proviso.

Also under that alleged right, the several Collectors of the United States would be vested with authority to discriminate between different ports of entry of the United States by relieving some ports of the obligations of payment of extra compensation while those provisions were being enforced at other ports. It is perfectly obvious that no such vast powers were intended to be given, or were given, to the collector under that proviso.

If the proviso is construed as petitioner contends, it would be unconstitutional, as an unlawful delegation of authority by Congress as a violation of Article I, Section 1 of the Constitution of the United States, which provides that all legislative power granted to the Federal Government shall be vested in Congress. *Panama Refining Co. v. Ryan*, 293 U. S. 338 on p. 529; *Sutherland v. Miller*, 79 W. Va. 796, at p. 803, 91 S. E. 993, at p. 996; *State v. Larson* (N. J.), 160 Atl. 556, p. 557; *Schecter v. U. S.*, 295 U. S. 405 at p. 541; *Crawford Statutory Construction*, p. 29, Sec. 17; *United States v. Scheveport Grain Co.*, 287 U. S. 77, 82; *U. S. v. Standard Brewery Co.*, 251 U. S. 210, 220; *U. S. v. LaVranca*, 222 U. S. 568.

VI.

PETITIONER'S CLAIM OF SET-OFF

Petitioner claims the right to deduct from respondents' additional pay for night, Sunday and holiday work a sum which would compensate Government for the official hours

not worked by them because of their employment during the night, Sunday and holiday hours for which extra compensation is sought. Such a contention is not justified.

By statute, the pay of customs employees is divided into two distinct items. One is an annual base pay which, in these cases, is $2,100.00. The other is an independent grant of additional pay for work at night and on Sundays and holidays. The two were made independent of each other by Act of March 2, 1799, and each succeeding grant has maintained that distinction.

If the services herein involved had been performed while customs employees were on a per diem basis, payable only for days actually worked in aid of the customs, it might be that they would not have received pay for any day during which they were not called to work. But Congress saw fit to replace that per diem system of compensation with the more modern and just one of an annual salary with suitable opportunity for advancement. The effect was an exchange of the per diem system for an annual salary, but neither affected the grant of additional pay.

Customs employees become entitled to their annual pay by becoming customs employees, assuming the duties of the position, and being available for duty and performing the work required by their superiors in office. When any assignments to duty are for night, Sunday or holiday work in connection with the designated services, they then become entitled to the additional pay provided by statute for night, Sunday and holiday service. In Section 5 the pay is referred to both as extra compensation and as additional pay. Art. 1242(e) 1937 Reg. provides that it shall be in addition to the annual pay.

If the Court should disagree with respondents on the question of set-off, we suggest that in such case, the right

of set-off should be allowed only against night pay, and not Sunday or holiday pay, and that Sunday and holiday pay be credited on the basis of services performed during any of the 24-hour period of those days.

VII.

SPECIAL CONSIDERATION OF STATUS OF AMBASSADOR BRIDGE AND DETROIT AND CANADA TUNNEL

Plaintiffs contend that both the tunnel and the bridge come within the definition of vehicle as defined in the act and that each is a "carriage or other contrivance used, or capable of being used, as a means of transportation on land" and as such the owners or agents of those facilities are required to file a bond as required by Section 451 of the act.

Black's Law Dictionary gives the common definition of a bridge to be "a structure erected over a stream * * * to facilitate the passage thereof." In Volume 4 of R. C. L. at page 193, the following definition appears, "A bridge has been defined to be a structure * * * erected over a river * * * for the more convenient passage of persons and beats and *for the transportation of baggage.*" (Italics ours.)

It is a means of passing from one bank to the other and so becomes a contrivance used as a means of transportation. It is a means used in transporting traffic from one bank to the other. Likewise, the tunnel in this case is a means used for transporting traffic under the stream.

There is no difference between a ferry, a bridge or a tunnel as a means of conveyance of persons, baggage or freight from one side of the river to the other. All accomplish the same purpose. Protection of the revenue

at the bridge and tunnel was just as necessary as at the ferries.

Furthermore, the bond is required from the "master, owner or *agent*" (italics ours) of such vessel or vehicle. When the operators of such bridges and tunnels accept fares from patrons for the use of their facilities, they become agents of such patrons for the purpose of furnishing a means of safe transportation to the opposite shore. They become more than mere licensees. The bridge company assumes an obligation for furnishing a means of safe passage. That liability continues until the patron leaves the bridge.

> "An agency may be defined as a contract either express or implied * * * by which one of the parties confides to the other the management of some business to be transacted * * * on his account * * *." (*2 Amer. Juris.*, Sect. 1, p. 12.)

The relationship is one of principal and agent to the same extent as in the case of the railway company and its passengers. This interpretation conforms to the meaning attached to the word "agent" by Customs Regulations which provide that the "transportation company" file the bond. (Article 1242(a) 1937, App. 81). There can be no question but that the bridge company and tunnel company, respectively, are transportation companies within the meaning of that regulation.

It must be conceded that ferry boats come within the definition of vessels. Petitioner admits the act applies to such boats. Certainly it cannot be contended that Congress ever intended to make railroad companies whose trains cross the border and international ferries liable for this extra compensation, and relieve such facilities as the bridge and tunnel companies from such payment. Such a result

is not only absurd and unreasonable, but it conflicts with the purpose and history of the statute, while respondents' construction conforms with such purposes and history and produces a result which is sensible and practical.

When the Treasury Department, in the 75th Congress, attempted to terminate the liability herein sought to be enforced, under the guise of representing to Congress that one of the provisions of the legislation, there introduced, was to bring such facilities as international bridges and tunnels within the facilities to be affected by additional compensation, it represented to Congress that a toll bridge had been held to be a common carrier, and that, as such common carrier, it would then become subject to the provisions of the act.[1] If the bridge and tunnel companies are common carriers they then certainly come within the definition of those who are required to file a bond.

CONCLUSION

We suggest that the provisions of this statute are clear and that the results of respondents' construction are reasonable and sensible and that to uphold the contentions of petitioner would constitute an exercise of judicial legislation and would require a holding that although Congress had employed plain, positive and easily understood language to express its intention, it had in reality intended something different which it did not express.

Petitioner's unlawful administration of the act has relieved the carriers from the burden of the additional pay and cast that burden upon the customs employees. The intent of Congress that Government be reimbursed can

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[1]81 Cong. Record 9392, Petitioner's brief p. 144.

still be carried out. In the meantime the employees of Government should have the additional pay so clearly provided by Congress.

For the reasons stated it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

ROBERT M. DRYSDALE,
Attorney for Respondents.

December 14, 1943.

APPENDIX

PERTINENT STATUTORY PROVISIONS

19 U. S. C. 1401, 1450 to 1454. These statutes appear in full in Petitioner's Brief.

Section 401:

> (a) "The word 'vessel' includes every description of watercraft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft."
>
> (b) "The word 'vehicle' includes every description of carriage or other contrivance used or capable of being used as a means of transportation on land, but does not include aircraft."
>
> (f) "The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian."
>
> (g) "The word 'night' means the time from five o'clock postmeridian to eight o'clock antemeridian."

Section 450:

> "No merchandise, baggage or passengers arriving in the United States from any foreign port or place, * * * shall be unladen from the carrying vessel or vehicle on Sunday, a holiday or at night, except under special license granted by the Collector * * *."

Section 451:

> "Before any such special license to unlade shall be granted, the master, owner or agent * * * shall be required to give a bond * * * conditioned to indemnify the United States for any loss or

liability which might occur or be occasioned by reason of the granting of such special licence and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of Section 5 * * *."

which Section 5 provides (19 U. S. C. 267):

"That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime (*night, Sunday or holiday*) services by inspectors, * * * who may be required to remain on duty between the hours of five o'clock post meridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the unlading * * *, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof, of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days pay for the full period from five o'clock postmeridian to eight o'clock antemeridian) and two additional days pay for Sunday or holiday duty.

"The said extra compensation shall be paid by the master, owner, agent or consignee * * * whenever such special license or permit * * * shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto * * *: Provided, that such extra compensation shall be paid if such officer or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery or examination takes place or not. (Insent in italics ours.)

"Provided further, that in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of

customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

PERTINENT CUSTOMS REGULATIONS

The pertinent provisions of the Customs Regulations promulgated in the 1923 and carried forward into 1931 regulations and now appearing in the 1937 Regulations, are as follows:

Overtime Service

"Art. 1242. 'Extra compensation—(a) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading * * * shall receive extra compensation, to be paid by the master, owner or agent of the vessel, or by the transportation company."

"Art. 1245. Sundays and holidays—(a) for authorized services performed on Sundays and holidays between 8:00 A.M. and 5:00 P.M., customs officers and employees shall be entitled to two days pay in addition to their regular compensation."

Hours of Business and Service

Article 1461, Hours of Business—(a) This section specifies the hours during which the Customs House shall remain open for business. The hours specified are from 9:00 A. M. to 4:30 P. M., on all days except Sundays and national holidays, and Saturday afternoons, and which last provision was omitted from the prior regulations.

Article 1462, Official Hours of Service:

(a) "* * *

(b) "The official hours of the following employees will be: * * * inspectors to whatever duty assigned * * *, from 8:00 A.M. to 5:00 P.M., 1 hour for lunch; * * *."

(c) "The above hours may be extended as the needs of the service demand, and such extension shall be without additional compensation, except as provided for in the Act of February 13, 1911, as amended by the Act of February 7, 1920."

(d) "The Act of February 7, 1920, also provides (here follows verbatim the customary working hour proviso so-called at the end of Section 5 *supra* 5)."

Inspectors of Customs

Article 1339 (b):

"* * *

"* * * They are also required to * * *; and perform such other duties as may be assigned to them by their superior officers."

1915 REGULATIONS

Article 1166—Sundays and legal holidays. Sundays and legal holidays will not be charged when they occur within an absence with pay, allowed by law, and which is not on account of sickness, or when they occur at the beginning or ending of any absence.

Sundays and legal holidays occurring within a period of absence on account of sickness, or contagious disease, or within any absence without pay, will be charged.

Article 1167—Record of absence. A record will be kept in each bureau or division of the daily attendance and

hours of arrival and departure and partial-day absences, due to late arrival or early departure, of all officers, clerks, and employees.

When partial-day absences aggregate a day, a day's absence will be charged against annual leave.

The foregoing regulations were carried forward into 1923 regulations as articles 1303 and 1304, respectively.

ACT OF FEBRUARY 13, 1911, ch. 46, 36 Stat. L. 899
SECTIONS 1 to 4 (for Sec. 5 of this Act see p. 88)

An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes

"Section 1. That upon arrival at any port in the United States of any vessel or other conveyance from a foreign port or place, either directly or by way of another port in the United States, or upon such arrival from another port in the United States of any vessel or other conveyance belonging to a line designated by the Secretary of the Treasury as a common carrier of bonded merchandise, and, after due report and entry of such vessel in accordance with existing law or due report, under such regulations as the Secretary of the Treasury may prescribe, of the arrival of such other conveyances, the collector of customs, with the concurrence of the naval officer at ports where there is a naval officer, shall grant, upon proper application therefor, a special license to lade or unlade the cargo of any such vessel or other conveyance at night; that is to say, between sunset and sunrise.

Sec. 2. That the master of any vessel from a foreign port or place, upon arrival within a customs collection district of the United States, bound to a port of entry in such district, may make pre-

liminary entry of the vessel by making oath or affirmation to the truth of the statements contained in his original manifest and delivering his said original manifest to the customs officer who shall board such veessel within such district, with a copy of said original manifest for the use of the naval officer at ports where there is a naval officer; whereupon, upon arrival at the wharf or place of discharge, the lading or unlading of the cargo of such vessel may proceed, by both day and night, under such regulations as the Secretary of the Treasury may prescribe.

Sec. 3. That before any such special license to lade or unlade at night shall be granted and before any permit shall be issued for the immediate lading or unlading of any such vessel after preliminary entry, as hereinbefore provided, either by day or by night the master, owner, agent, or consignee of such vessel or other conveyance shall make proper application therefor and shall at the same time execute and deliver to the United States, through the collector of customs, a good and sufficient bond, in a penal sum to be approved by the said collector, conditioned to indemnify and save the United States harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special license or the issuing or granting of such permit for immediate lading or unlading; or the master, owner, agent, consignee, or probable consignee, as aforesaid, may execute and deliver to the United States, in like manner and form, a good and sufficient bond, in the penal sum of fifty thousand dollars, conditioned to indemnify and save the United States harmless from any and all loses and liabilities which may occur or be occasioned by reason of the granting of such special licenses and the issuing or granting of such permits for immediate lading or unlading by day and night during a period of six months.

Sec. 4. Such application having been duly made and the required bond having been duly executed and delivered, special license or licenses to lade or unlade at night after regular entry of vessels, and due report of other conveyances, may be granted, and a permit or permits may be issued for the immediate lading and unlading, by day and night, of vessels admitted to preliminary entry, or of other conveyances of which due report of arrival has been made: *Provided,* That the provisions of this act shall extend and be applicable to any vessels or other conveyances bound to a port of entry in the United States to be unladen at a port of delivery or to be unladen at a place of discharge designated by the Secretary of the Treasury under the provisions of section twenty-seven hundred and seventy-six of the Revised Statutes as amended: *Provided further,* That when preliminary entry of a vessel shall be made by the master as herein provided he shall not be relieved from making due report and entry of his vessel at the customhouse in accordance with existing law, and any liability of the master or owner of any vessel to the owner or consignee of any merchandise landed from her shall not be affected by the granting of such special license, but such liability shall continue until the merchandise is properly removed from the dock whereon the same may be landed."

PRIOR ENACTMENTS

Pertinent legislation from Act of March 2, 1799, to and including Act of March 13, 1911, effecting requisitioninig by the Government of the unusual hours of customs employees.

Section 50, Act of March 2, 1799 (1 Stat. 665):

"And be it further enacted, that no goods, wares or merchandise, brought in any ship or vessel from

any foreign port or place, shall be unladen or delivered from such ship or vessel, within the United States, but in open day, that is to say, between the rising and setting of the sun, except by special license * * *."

Section 53, Act of March 2, 1799, (1 Stat. 667)

"* * *. And it shall be the duty of the said inspector or inspectors, to attend to the delivery of the cargo or cargoes under their care, at all times when the unlading or delivery of goods, wares and merchandise is lawful, particularly from the rising till the setting of the sun on each day, Sundays and the Fourth day of July in each year excepted; * * *"

Section 54, Act of March 2, 1799, (1 Stat. 668)

"* * *. And it shall also be lawful for the inspectors who may be put on board of any ship or vessel, (and they are hereby required and enjoined so to do) to secure after sunset in each evening, or previous to their quitting the ship or vessel, the hatches and other communications with the hold of such ship or vessel, or any part thereof he or they may judge necessary, with locks or other proper fastenings, which locks or other fastenings shall not be opened, broken, or removed until the morning following, or after the rising of the sun, and in the presence of the inspector or inspectors, by whom the same shall have been so affixed, except by special license from the collector of the port, and naval officer thereof, if any, for that purpose, first had and obtained. * * *"

This statute was amended by Act of March 3, 1873; 17 Stat. 579, R. S. 2871 as follows:

"The collector of customs * * * shall grant, upon proper application therefor, a special license to unlade the cargo of said vessel at night, that is

to say, between sunset and sunrise, but before any such special license is granted, the master, agents, or consignees of the vessel shall execute and deliver to the collector a good and sufficient bond, to be approved by him, conditioned to indemnify and save the collector harmless from any and all losses and liabilities which may occur or be occasioned by reason of the granting of such special license. * * * The collector, under such general regulations as the Secretary of the Treasury may prescribe, shall fix a uniform and reasonable rate of compensation for like service, to be paid by the master, owner or consignee, whenever such special license is granted, and shall collect and distribute the same among the inspectors assigned to superintend the unlading of the cargo."

Act of June 26, 1884 (23 Stat. 59, amending R. S. 2872). Sect. 25.

"When the license to unload between the setting and rising of the sun is granted to a sailing vessel under this section, a fixed, uniform, and reasonable compensation may be allowed to the inspector or inspectors for service between the setting and rising of the sun, under such regulations as the Secretary of the Treasury may prescribe, to be received by the Collector * * * and to be paid by him to the Inspector or Inspectors."

Act of June 30, 1906 (34 Stat. 633, amending R. S. 2871)

"Upon arrival at any port of the United States of a steamship or other conveyance from a foreign port or place, * * * the Collector of Customs, with the concurrence of the Naval Officer, where there is one, upon or after the issuing of a general order, shall grant, upon proper application therefor, a special license to lade or unlade the cargo of said vessel or other conveyance at night—that is to say, between sunset and sunrise; * * * the Collector

under such general regulations as the Secretary of the Treasury may prescribe, shall fix a uniform and reasonable rate of compensation for like service, • • • and shall collect and distribute the same among the inspectors assigned to superintend the lading or unlading of the cargo."

OLD AND NEW SECTIONS 5

Following is Section 5 of Act of February 13, 1911 (36 Stat. 901) and the new Section 5 in Act of February 7, 1920 (41 Stat. 402; U. S. C. (1940), Title 19, Sec. 267) shown together (1st four sections at p. 83).

The phrases omitted from old Section 5 are bracketed and are in small capitals. The new phrases are in *italics*. That part of the section which remained is in ordinary type.

"The Secretary of the Treasury shall fix a reasonable rate of extra compensation for [NIGHT] *overtime* services of inspectors, storekeepers, weighers, and other customs officers and employees *who may be required to remain on duty between the hours of five o'clock post-meridian and eight o'clock ante-meridian, or on Sundays or holidays,* to *perform services* in connection with the lading or unlading of cargo [AT NIGHT], or the lading [AT NIGHT] of cargo or merchandise for transportation in bond or for exportation in bond or for [THE] exportation with benefit of drawback, *or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage* [BUT SUCH RATE OF COMPENSATION SHALL NOT EXCEED AN AMOUNT EQUAL TO DOUBLE THE RATE OF COMPENSATION ALLOWED TO EACH SUCH OFFICER OR EMPLOYEE FOR LIKE SERVICES RENDERED BY DAY], *such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the*

overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. [,] The said extra compensation *shall* [TO] be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not.* Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent or consignee of such vessel[s]: *Provided further, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.*"

67th CONGRESS—AMENDMENT PROPOSED

Mr. Robillard, representing the International Bridge at Niagara Falls, suggested the following amendments to S. 2188 in 67th Congress. See Hearings S. Comm. on Commerce, S. 1504, S. 1774 and S. 2188, 67th Cong., 2nd Sess., p. 109.

> "The amendments we suggest to Senator Nelson's bill, S. 2188, are, first, after the words 'railroad trains' in line 4, page 4, we suggest adding:
>
> bridges, street railway cars, interurban cars, or ferries and the owners, operators, or agents thereof shall not be required to pay such compensation.
>
> Then we suggest that the following section be added to that bill, S. 2188, following the above amendment:
>
> *And provided further,* That for the performance of customs inspection and collection upon international bridges, and upon and in connection with interurban and street railway cars operated on a regular daily schedule, and ferry boats operated on a regular daily schedule, a sufficient number of customs employees shall be assigned to regular duty so that no such employee shall be required to perform more than six days of service in any week, and services performed in connection with such bridges, cars, and ferries shall not be deemed overtime service, although performed between 5 o'clock postmeridian and 8 o'clock antemeridian, or on Sundays, or holidays."

70th CONGRESS—AMENDMENT PROPOSED

H. R. 12103 in 70th Congress. See Hearing, House Comm. on Ways and Means, 70th Cong., 2nd Sess., Vol. XVI, p. 10275.

"Provided, however, That no inspectors, storekeepers, weighers or other customs officers or employees shall receive extra for overtime compensation for services rendered in connection with traffic by ferries and railroad trains, but the collector of customs shall regulate their hours of work so that no such officer or employee shall be required to remain on duty in any one day, including Sundays and holidays, for a longer period than eight hours, and that the bond required by this section to be given by said railroad companies shall not be condition to pay the compensation and expenses of the customs officers and employees whose services are required in connection with unlading at night or on Sundays and holidays under the provisions of said section 5."

REQUESTED FINDINGS ON EFFECT OF DEFICIENCY APPROPRIATION ACT OF 1936

Exception No. 4

Plaintiff excepts to that part of finding No. 6 on p. 15 reading as follows:

> "During the period for which claims are being made, viz., September 1, 1931, to August 31, 1937, excess pay given to the inspectors has first been collected by the Collector of Customs from the carrier concerned, and by the Collector remitted to the inspectors by check on the fund so collected."

There was a change in the practice, as related in this findings, when the appropriation act of June 22, 1936 (49 Stat. 1636) went into effect. Under that Act, a fund was established for the payment of extra compensation to customs inspectors so that they would not be required to wait until payment was made by the agencies of transportation receiving the benefit of such services. After that time,

payment was made to the customs employees by a Treasury Department check drawn on the fund provided for that purpose under the provisions of that Act.

R. 1, p. 141, 8-53. (Stringer);
R. 1, p. 170, Q. 15 (Petty).

Proposed Special Finding No. 8

From September 1, 1931, until June 30, 1936, when proper regulations were issued under the provisions of the appropriation act of June 22, 1936, the extra compensation paid to inspectors was first collected, by the Collector of Customs, from the agencies of transportation, and by the Collector remitted to the inspectors by checks upon the fund so collected.

Under the Act of June 22, 1936 (49 Stat. 1636) a fund was established for the payment of extra compensation to customs inspectors so that they would not be required to wait until payment was made by the agencies of transportation receiving the benefit of such services.

Thereafter extra compensation was paid to customs inspectors from the treasury of the United States and the inspectors were not required to wait the collection of such extra compensation from the agencies of transportation.

Commissioner Hobbs' Finding No. 6, p. 15, as modified.

R. 1, p. 141, Q. 53 (Stringer).
R. 1, p. 170, Q. 15 (Petty).

H. R. 6738 AS INTRODUCED IN 75th CONGRESS BY THE TREASURY DEPARTMENT

That portion in italics is the proposed amendment

Upon a request made by the owner, master, or person in charge of a vessel or vehicle, or by or on behalf of a common carrier or the owner or consignee of any merchandise, for the services of customs officers or employees at night or on a Sunday or holiday for the performance of which qualified officers or employees on regular duty are not available, the collector shall assign available customs officers or employees in accordance with the request to perform any services which may lawfully be performed by them during regular hours of business, but only if the person requesting such services gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday. *If qualified customs officers or employees on regular duty are available to perform the requested services, they shall perform such services without extra compensation.*

REGARDING WORKING HOUR PROVISO

Congressional Record, Vol. 59, Part 2,
66th Congress, Jan. 28, 1940

(Proceedings House of Representatives)

(Pages 2172 and 2173)

"Mr. Dupre: Mr. Chairman, I intend to offer the following amendment, and I might as well discuss it now. I will ask the Clerk to read the amendment.

The Clerk read as follows:

'Amendment offered by Mr. Dupre: Page 3, line 16, strike out the quotation marks, insert a colon and the following:

Provided further, That in those ports where customary working hours are other than those hereinabove mentioned the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.'

Mr. Dupre: Mr. Chairman, as those who have caught the purport of the amendment will discover, no hostility to the bill is intended by it. On the contrary, I am heartily in favor of the measure, both in its fixing an eight-hour day and in its overtime provisions. The amendment is offered simply to meet the situation that exists in my home city of New Orleans and possibly in other ports of the country. The bill as drawn provides for overtime pay between the hours of 5 o'clock postmeridian and 8 o'clock antemeridian, proceeding on the theory that working hours begin in all ports at 8 o'clock in the morning and end

at 5, with an hour for lunch. It happens that in the city of New Orleans conditions are different, as was set forth in a telegram received by me from the agent of the New Orleans Steamship Association, which will explain exactly what the situation is there. I will ask the Clerk to read the telegram.

The Chairman: Without objection, the Clerk will read the telegram in the time of the gentleman.

The Clerk read as follows:

New Orleans, La., January 27, 1920.

Hon. H. Garland Dupre,
House of Representatives,
Washington, D. C.:

We understand that Senate bill 3418 passed the Senate December 16, has been reported favorably, and this bill fixes the rate of overtime compensation and hours in reference to customhouse officers and employees, etc. The regular day hours of longshoremen at New Orleans are from 7 in the morning to 4 in the afternoon, with meal hour from 12 to 1, while bill in question provides hours of customs employees from 8 in the morning to 5 in the afternoon, so that there will result much confusion and unnnecessary expense. Therefore the New Orleans Steamship Association request that you will use your influence toward having inserted in this bill a clause providing that in those ports or in those industries where the customary hours are from 7 in the morning to 4 in the afternoon authority be vested in the collector of customs to regulate the hours of customs employees to agree with prevailing customary hours in those ports or industries. We would appreciate your giving this matter your earnest attention.

S. T. Demilt.

Mr. Dupre: In accordance with that request and in accordance with the condition that exists in New Orleans, I have offered the amendment, which is entirely permissive. It leaves with the collector of customs the authority to regulate hours of customs employees so as to agree with the prevailing working hours in those ports; but I have safeguarded the eight-hour day which this bill provides for, and I have safeguarded the provision for overtime by adding the words—

> But nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.

I have submitted that amendment to the two majority members of the subcommittee of the Ways and Means Committee who considered the bill, the gentleman from Massachusetts (Mr. Treadway) and the gentleman from Connecticut (Mr. Tilson), and they think the amendment is entirely unobjectionable, saying that the conditions referred to had not been drawn to the attention of the committee.

Gentlemen here will realize what would happen if longshoremen, who have a way of their own about many things, decided to go to work at 7 o'clock and and work until 4, and under the law the customhouse employees, who should work concomitantly with the longshoremen, could not get any overtime pay until between the hours of 5 p.m. and 8 the next morning. There would be a hiatus between 4 o'clock when the longshoremen stopped work and 5 o'clock when the customhouse employees would begin to get their overtime, naturally the latter would not want to work in the interim. The result would be very unfortunate, and this merely allows the collector of customs to say that those two bodies of men, both of whom

are essential to unloading and loading the ship, may be allowed to work at the same time. It is not mandatory in any way, but merely discretionary with the collector. A similar telegram has been received by my colleague Mr. O'Connor, of Louisiana, who is here in the chamber, and who shares with me the views expressed by me both as to this bill and to the amendment proposed."

* * * * *

(Pages 2177 and 2178)

"Mr. Dupre: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.

Mr. Chairman: The gentleman from Louisiana offers an amendment, which the Clerk will report.

The Clerk read as follows:

Amendment offered by Mr. Dupre: Page e, line 10, strike out the quotation marks, insert a semicolon, and the following:

'Provided further, That in those ports where customary working hours are other than those herein above mentioned the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports; but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed.'

Mr. Longworth: I reserve a point of order against the amendment for the purpose of hearing an explanation of it.

Mr. Dupre: Mr. Chairman, this is the identical amendment which I discussed during the general debate at the

request of the gentleman from Massachusetts (Mr. Treadway). I would have preferred to wait until this time, because it requires a renewal of the discussion.

Mr. Longworth: I have looked forward with intense interest to the pleasure of listening to the gentleman.

Mr. Dupre: * * * The bill in question, in providing for overtime pay, fixes the same between 5 o'clock p.m. and 8 o'clock a.m. It happens that in the city of New Orleans the working hours of the longshoremen are from 7 a.m. to 4 p.m., and in order that there shall be no conflict between this bill and the working hours of the laboring men of that city, and possibly in other ports, this proviso simply authorizes the collector of customs to adjust the hours of the customhouse employees with those of the prevailing working hours in that city. In other words, if the men begin their work at 7 o'clock and work until 4, the collector of customs can provide that the overtime shall be from 4 p.m. until 7 the next morning instead of from 5 p.m. until 8 o'clock the next morning. It is entirely permissive. If the collector of customs sees any reason why it should not be done, it is within his authority not to do it, and I have safeguarded absolutely any possibility of lengthening the working day to more than eight hours provided by the bill or interfering with the overtime charge in any way.

Mr. Treadway: As I understand it, it is simply to conform the hours in the lading and unlading of vessels and the customhouse hours at that port.

Mr. Dupre: Entirely; and at other ports, for aught I know. I trust the gentleman from Ohio has enjoyed my explanation of the matter."

REGARDING INTENTION TO INCREASE PAY OF CUSTOMS EMPLOYEES

(Congressional Record continued)

(Page 2171)

"Lading or unlading of vessels at night.

Mr. Treadway: Mr. Speaker, by direction of the Committee on Ways and Means I call up the bill S. 3418.

The Speaker: The gentleman from Massachusetts by direction of the Committee on Ways and Means, calls up a bill, which the Clerk will report.

The Clerk read as follows:

> 'An Act (S. 3418) to amend an act entitled "An act to provide for the lading and unlading of vessels at night, the preliminary entry of vessels, and for other purposes, approved Ferbruary 13, 1911."'

* * * * *

"Mr. Treadway: Mr. Chairman, the bill before the committee, S. 3418, has to do with the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes. It is an amendment of the original act of February 13, 1911. There has been ever since the act went into effect and I think previously to that for the inspectors of customs at customhouses and inspectors of vessels, who have to do with the unlading, a uniform day of 10 hours. This, as you know, is two hours longer than the accepted working day at the present time, and there can be no good reason why the same length of day's work should not be accorded to the men having to do with the customs work as in any other line of governmental employment. Therefore this amendment will reduce the

hours of labor from 10 to 8. *It also puts into effect as law the method of payment for overtime, rather than having the payment for overtime regulated by customs regulations. It establishes as law, in other words, the system for payment of overtime.* It also permits all men who are ordered to report for lading or unlading of vessels to be paid, when ordered to report, for overtime. It seems that through a regulation of the customs department if these inspectors have been ordered to appear for work and for any reason a vessel was not there for them to go to work on they did not receive pay for that time. That seems entirely unfair. It is not the fault of the inspectors that the vessels are not there. It is not a fault of theirs that they are not working rather than waiting to work. Therefore there is this further provision whereby payment will be made to the men if ordered to report for overtime work.

The bill does one other thing. It seems there has been a distinction between payment to men who were employed in unlading cargoes on vessels and those unlading or examining baggage of passengers. There can be no good excuse for that condition other than the fact that no provision of law covered the point, and through a Treasury decision at some time these men who are liable for overtime work in unlading vessels consisting of passengers' baggage and examination of that baggage receive no pay for that work, whereas their colleagues in the same line of work happening to be employed on the freight of the same boat would be paid. I might add that phrases appear in the bill showing that this payment is made by the steamship company reimbursing the Government for the amount paid. *The pay of these inspectors has been very law. The rates of pay are $4, $5 and $6 per day for a 10 hour day.* I think the members of the committee will agree with me that while we retain that same rate of

pay we ought to be willing to pay these men for overtime on a basis of an 8 hour day rather than on the basis of a 10 hour day."

• • • • •

"Mr. Husted: I understood that the customs inspectors were very much underpaid.

Mr. Treadway: I think there is no question about that.

Mr. Husted: I would like to ask the gentleman if he thinks there would be sufficient overtime work to give these men adequate compensation under the provision for overtime in this bill?

Mr. Treadway: I will state to the gentleman that the department, as I am informed, is taking up the rescheduling of all customs employees, and pending that official report to the Secretary of the Treasury, or whoever may be making the investigation, this method is agreeable both to the department and to the men; and I might add, there is sure to be much more overtime on the basis of 8 hours than if the men were working 10 hours.

Mr. Husted: There is, then, a reasonable prospect that by some future legislation the compensation of these men will be increased?"

• • • • •

(Page 2172)

"There has been submitted to a Member of the other branch, who was particularly interested in this bill, an opinion from the collector of the port of New York, where of course the larger number of these men are employed. I wish to read, Mr. Chairman, just a short extract from that letter: I read:

'On behalf of the underpaid customs employees of this port I want to express grateful appreciation of your successful efforts in putting through the Senate bill 3418, which provides, among other things, for compensation for the customs inspectors employed on baggage duty for their services at night and on holidays. This will place them on an equal footing with inspectors who are employed on cargo and who now receive from the steamship companies compensation for night work.'

Then the collector goes on to say that fundamentally he does not believe in the Government being reimbursed for Government work by steamship companies but that has not directly to do with this case. He says further:

'I am sure if you knew as definitely as I know the distressing conditions among the Government's employees in this port, you would realize more fully perhaps why we are grateful to you for this effort in our behalf. When you realize that with the exception of a bonus of $240 per annum to all Federal employees receiving up to and including $2,500, these men are getting practically the same scale of wages given them a quarter of a century ago, you will understand, I am sure, why I have profound admiration for their patience and their patriotism in sticking to their jobs.

As a matter of fact, we are rapidly losing our most efficient men. Resignations are coming to me daily, and the force is now materially reduced beyond where it was prior to the war. The merchants' association and other civic organizations in New York have interested themselves in the situation, and will soon make an appeal to Congress to take some steps in the direction of safeguarding the interests of importers and exporters in this port by way of strengthening the customs machinery here.

> At all angles our Federal employees see a most prodigal display of unprecedented wealth. Meanwhile they are harassed with the consciousness that in many instances at home their children are suffering for the want of proper food and clothing. They know that ours is the richest Government in the history of the world, and they are wondering why they, the servants of this most wealthy Government must go on in poverty.'

The letter is signed by Byron H. Newton, collector. I think that is very strong evidence in behalf of the legislation called for by this bill from a man of experience in the very line of coming in contact with these men who are working for a very meagre stipend, needing to be men of good appearance, gentlemen in their conduct toward the passengers with whom they come in contact, and recognizing that the service must become impaired unless a means can be found, as is furnished by this bill, to increase the pay of the men."

(Page 2173)

"Mr. Benson: Mr. Chairman, the purport of the bill has been called to my attention by a number of men working in Baltimore. I happen to be familiar with the work these men are doing, and this bill meets a much needed reform. At one time these men were allowed to collect extra pay from the shipper, but now under some regulation that is prevented.

They are really the most underpaid for men of their ability and fidelity of men in the Government service."

* * * * *

"Mr. MacCrate: Mr. Chairman, in New York City we have a great many of these men employed in the Customs

Service, and during the war an attempt was made to get them to leave the service. You can understand that men familiar with the shipping business during the war could receive much larger remuneration outside of the service than inside; and yet, notwithstanding the temptation, the greater portion of the customs employees and inspectors stayed and maintained their relationship with the Government.

I know many men, working there nights and Sundays and then having to report early Monday morning, stayed there and performed their duties notwithstanding these tempting offers from outside.

Yesterday something was said by a gentleman in the House that it seemed strange, in view of the complaints as to the low salaries of employees, that they should want to hang on to the Federal pay roll. As a matter of fact, I always give advice to young men and women who seek service on the Federal pay roll not to do it. The best thing they can do is to seek employment outside; but once they get attached to the Federal service it then becomes a question, after leaving that service, where they will get similar employment. I believe the Federal Government is not helped by suggestions that young men and women should leave its service, but we should attempt to give them adequate compensation for the services they render to the Government.

In our own city of New York I know that the letter carriers and postal clerks and other Government employees are receiving much less than the wages paid to unskilled labor. The temptation for men and women in Federal employ to quit the service is much greater than most people realize, and I am certain that members of Congress do not desire to encourage them to do that, but

desire rather to hold efficient employees by adequate compensation. (Applause.)"

(Page 2175)

"Mr. Briggs: Mr. Chairman and gentlemen of the committee, I am very much in favor of the bill pending before the committee. It seems to me that the Government has been waiting rather a long time to grant some relief to these men who have been so patient and faithful for so long without such relief. A great number of these customs employees and other employees covered by this bill are employed and along the dock fronts in the customs service in the great ports throughout this country, and many of them at the ports in my district—the ports of Galveston and of Texas City. Those men work at all times and in all weathers, and they do not complain. They can not stand the burden and pressing costs of the high increase in living without some relief, however. *This bill undertakes to put into force and effect by law* regulations that the Government, through the Treasury Department, has already sought to establish almost to the same degree. The bill carries a little greater compensation, as I understand it, than now obtained, compensation that is absolutely needed.

* * * * *

(Page 2176)

"Mr. Tilson: It seemed to the subcommittee that, taking the regulations which have prevailed for many years, and taking the very low compensation which these men receive per day, the schedule as fixed in this bill is not more than fair for them."

(Page 2177)

"Mr. Goldfogle: Mr. Chairman, I rise to express my hearty approval of this measure. The force of customs inspectors and other customs officers covered by this bill have been and are, in my opinion, much underpaid. They render faithful and arduous service. During the winter months their work is particularly exacting and hard. They are an intelligent set of officials, and were they to turn to other avenues of employment outside Government work and do it with the same zeal, earnestness, fidelity, and efficiency as they do in the Customs Service, a private employer with due regard to his own interest would give them a large increase over what their official salaries are. They are necessarily required in wind and weather, and in storm and often amid great difficulties, to perform their service, and they have performed it well, and I am glad that at least something has been done toward helping this very deserving class of Government employees. In the light of living conditions, the ever-increasing cost of living, the inability of these men, especially in the large cities, to get along with the meager pay they are receiving, and so that they may properly and decently provide for thmselves and their families, it is but meet and proper that the Government should properly provide suitable compensation. Even this bill fails to give those men what they in justice and fairness ought to get. This however, is a step in the right direction, and I am glad to support the bill.

Mr. Pell: Mr. Chairman, no one who has ever returned to the United States can have failed to notice the courteous and efficient treatment that he has received from the customs officials. I have come through several American customhouses myself and have been impressed every time with the thoroughness, the politeness, and the sense of

duty displayed by these men. Of course, there have been complaints, but my own observation is that in every case the complainant is a would-be smuggler.

These men belong to a particularly hard-used class. They must have a certain education and must keep up a certain amount of appearances. They are like all people on small, fixed incomes, being crushed between the devil and the deep sea. We should, I think, do what we can to relieve their case.

• • • • •

United States of America

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

Nos. 142-146

UNITED STATES, Petitioner,

vs.

HOWARD C. MYERS

—

UNITED STATES, Petitioner,

vs.

JOHN H. ARBLE

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UNITED STATES, Petitioner,

vs.

CHARLES C. MARTIN

—

UNITED STATES, Petitioner,

vs.

WALTER O. PLITZ

—

UNITED STATES, Petitioner,

vs.

GEORGE H. SPITZ

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

RESPONDENTS' PETITION FOR LEAVE TO FILE A SUPPLEMENTAL MEMORANDUM

ROBERT M. DRYSDALE,
Attorney for Respondents,
1538 Dime Building,
Detroit, Michigan.

Inter-State Printing Co., Cass Bldg., 457 Cass St., W. Detroit, Mich.

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Respondents petition the Court for leave to file a supplemental memorandum showing the appropriate answers to several questions asked by the Court during the argument, and which will more fully explain respondents' answers to those questions and which we believe will facilitate the work of the Court. The memorandum is printed and submitted herewith.

ROBERT M. DRYSDALE,
Attorney for Respondents.

December 22, 1943.

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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

RESPONDENTS' SUPPLEMENTAL MEMORANDUM

Further answering the questions of the Honorable the Chief Justice and Associate Justices propounded at the argument, we summarize as follows.

Although the Secretary of the Treasury never selected the word "overtime" and gave to that word a separate definition, yet he did define with particularity the services to be compensated by the overtime pay. If those regulations had been obeyed respondents would have received payment in full for the services here involved.

The regulations, as existing since 1922, defining those services, appear in 1937 regulations and are hereinafter set forth in full, and are paraphrased as follows:

Overtime Service

"Art. 1242. Extra compensation.—(a) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise, * * * *shall receive extra compensation, to be paid by* the master, owner, or agent of the vessel, or by *the transportation company.*" (Italics ours.)

NOTE. The foregoing is the enacting clause of the Regulations and creates the grant of additional pay and the word "overtime" is not used therein.

"(e) The extra compensation for *overtime services* is in addition to the regular compensation paid by the Government * * *." (Italics ours.)

NOTE. We suggest that the word "overtime" as used in section (e) was intended to and does mean the services described in section (a), and includes both night services and also Sunday and holiday services, as both, are in addi-

tion to the regular pay therein mentioned. Also, that as so used, they set forth the Secretary's definition of "overtime." Otherwise that word would have been further defined.

Art. 1243. *Definition of "night" and "holiday."*

Here follows the statutory definition of "night." The days designated as holidays are enumerated.

> "Art. 1244. *Rate of Compensation.*—(a) For service performed after 5 P. M. of any days, including Sundays and holidays, one-half day's pay will be allowed for each 2 hours or fraction thereof of at least 1 hour that the overtime extends beyond 5 P. M., provided that the overtime is not less than one hour. * * *"

NOTE. Respondents suggest that services between 5 P. P. and 8 A. M. are here described as "overtime services."

> "Art. 1245. *Sundays and holidays.*—(a) For authorized services performed on Sundays and holidays between 8 A. M. and 5 P. M., customs officers and employees shall be entitled to 2 days' pay in addition to their regular compensation."

NOTE. The word "overtime" is not used in connection with the Sunday and holiday pay prescribed in the foregoing section (a), although 2 days extra pay for services on those days is allowed.

For convenience we quote the definition of "overtime" as given by this Court in the case of *International Railway v. Davidson*, 257 U. S. 506, 510, 511:

> "The Fifth Section gives the Secretary of the Treasury power to fix extra compensation to be paid customs officials serving at night, on Sundays or on holidays in connection with lading or unlad-

> ing * * *. *This substituted section defines what shall be deemed overtime*, how the rate of extra pay shall be fixed, and what the work is, for which extra compensation shall be paid." (Italics ours.)

This definition was cited by the District Court for the Eastern District of Michigan, in *Ferguson v. Port Huron & Sarnia Ferry Co.*, 13 Fed. 2d 489, 492, from which we quote:

> "As was pointed out by the Supreme Court in its opinion in *International Railway Co. v. Davidson*, 257 U. S. 506, 42 S. Ct. 179, 66 L. Ed. 341: 'This * * * section defines what shall be deemed overtime.' The only definition thus employed was the reference to the period of time between the particular hours specified, without regard to the question whether the services rendered 'at night' or 'on Sundays or holidays' immediately and continuously followed services just completed for regular pay. Clearly, the object of the statute was to facilitate lading and unlading 'at night' and on Sundays and holidays, irrespective of whether the officers working in connection therewith had previously worked during the regular hours of the immediately preceding regular working 'day.'"

The meaning of the words "remain on duty" is shown in respondents' brief at pages 60 and 31. By giving effect to petitioner's construction that those words denote an inspector must remain on duty after 5 o'clock, would accomplish an unreasonable result, in this, that one assigned to duty during the night, as for example, between 10 P. M. and 12 P. M., would not then be entitled to overtime because of not having remained on duty after 5 P. M.

Answering the questions as to the conditions under which extra compensation was paid for Sunday and holiday services, the practice, as it existed, is accurately described in Findings Nos. 5 and 6, R. 41, 42, which shows that prior

to November 15, 1929, additional compensation was paid for Sunday and holiday services at all facilities then open, except for a limited period at the Michigan Central Freight Station, and thereafter that such additional compensation was paid only at the car ferries. When such payment was made, two conditions united, namely, the work always was performed on a Sunday or a holiday, and also the work was in excess of 48 hours per week.

No regulation was ever promulgated by the Secretary conditioning that payment on hours in excess of any number of stated hours per week. Payment for any such consideration would have been illegal, as the statute then permitted payment only for days actually worked in aid of the customs. Probably the true reason why such payments were made, was stated by the Mr. Bond, cited by petitioner, in a brief filed by him with Senate Committee on Commerce, 67th Congress, in which he stated:

> "The Treasury Department has ruled that where railroad, ferry, or bridge traffic is continuous throughout the 24 hours, those are the 'customary working hours,' and has placed inspectors on duty in 8-hour shifts, and no charge is made against transportation companies for overtime compensation on week days; *the only charge being for Sundays and holidays, days which are universally recognized in all industries to be overtime.* * * *" (Italics ours.) (Petitioner's Brief, pp. 118, 119.)

HISTORY OF GRANT OF ADDITIONAL PAY

Act of March 2, 1799, granted to customs inspectors their hours on Sunday, the Fourth of July and those between sunset and sunrise, resulting in leaving with them the right to bargain with the vessel owner for a rate to be paid for those hours, whenever a special license to unlade was issued.

Act of March 3, 1873, provided for the fixing of a reasonable and uniform rate for the night hours included in the grant of additional pay, and required Government to assume the obligation of collecting the same and paying the inspectors. It bettered the status of customs employees.

By Act of June 26, 1884, the grant of additional pay was extended to services in connection with unlading sailing vessels.

By Act of February 13, 1911, the grant was extended to include additional services and employees. A question might arise whether by reason of the language used in this act, this grant was broad enough to include Sunday and holiday services. However, the Secretary construed the grant to include services on those days.

By Act of February 7, 1920, the grant was again broadened to include additional employees and services and the wording was altered to include specifically, Sunday and holiday work. In this enactment, the word "overtime" was first used in connection with this grant. Prior to that time, every succeeding enactment had bettered the status of customs employees. The purpose of this enactment was to do likwise. For 121 years the intention of Congress with respect to the consideration for the additional pay had been expressed in terms of services performed at night and on Sundays and holidays. Under those conditions, to place a construction on the words "overtime services" so as to impair that grant is unreasonable and conflicts with the history and purpose of the grant.

The Tariff Act of 1922 extended the grant to include all of the facilities and services here involved.

Respectfully submitted,

ROBERT M. DRYSDALE,
Attorney for Respondents.

December 22, 1943.

APPENDIX

OVERTIME SERVICE

(Italics ours)

Art. 1242. Extra compensation.—*(a)* Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise, or lading cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo or merchandise on or from the wharf, or in connection with the unlading, receiving or examination of passengers' baggage, or in boarding vessels, or in the entrance and clearance of vessels, or in the issuance and recording of their marine documents and instruments of title, shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company.

(*b*) Boarding officers shall receive extra compensation for night services and Sunday and holiday service at the same rates as other customs officers, the amount of such extra compensation to be prorated among the various vessels boarded.

(*c*) The rates of extra compensation are payable in cases where the services of customs officers or employees have been duly requested and the officers or employees have reported for duty, even though no actual service may be performed.

(*d*) Customs officers and employees should be ordered to report for duty sufficiently in advance of the expected arrival of a train or vessel to properly safeguard the reve-

nue. However, waiting time should be reasonable and compatible with the circumstances in each case.

(*e*) The extra compensation for *overtime* services is in addition to the regular compensation paid by the Government in the case of officers and employees whose compensation is fixed on the ordinary per diem basis and those receiving a compensation per month or per annum.

(*f*) Extra compensation for "waiting time" will not be allowed unless and until an officer or employee actually reports for duty.

Art. 1243. Definition of "night" and "holiday."—For the purpose of computing extra compensation the word "night" will be construed to mean the time from 5 p. m. to 8 a. m. and the term "holiday" shall include only national holidays, viz, January 1, February 22, May 30, July 4, the first Monday in September, Thanskgiving Day (when designated by the President), and December 25, and such other days as may be made national holidays.

Art. 1244. Rate of compensation.—(*a*) For service performed after 5 p. m. of any days, including Sundays and holidays, one-half day's pay will be allowed for each 2 hours or fraction thereof of at least 1 hour that the *overtime* extends beyond 5 p. m., provided that the *overtime* is not less than 1 hour. The maximum amount which may be paid an employee for services between 5 p. m. and 8 a. m. shall not exceed 2½ days' pay.

(*b*) In computing the amount earned for *overtime* at the rate of "one-half day's pay for each 2 hours or fraction thereof of at least 1 hour that the *overtime* extends beyond 5 p. m.," one-half day's pay shall be one-half of the gross daily rate of pay; each 2 hours is the time period for pur-

pose of computation; at least 1 hour means the minimum service in each period for which extra pay may be granted. If service continues beyond a 2-hour period, it must extend for at least 1 hour into the following 2-hour period to be entitled to extra pay for the second period. When the *overtime* extends beyond 5 p. m. payment of extra compensation from 5 p. m. for services consisting of at least 1 hour is authorized, even though such services may not actually begin until 7 p. m., 9 p. m., or later: *Provided, however,* That the officer rendering the service remained on duty from 5 p. m., in which case the time between 5 p. m., and the time of beginning the actual service shall be computed as waiting time, and where the actual services begin as late as 9 p. m. there should be an affirmative statement that the officer was required to remain on duty between 5 p. m. and 9 p. m., if a charge for waiting time is made. Where, however, service is rendered between 6 a. m. and 8 a. m. only, the charge for such services, or 1 hour thereof, will be one-half day's extra pay.

(*c*) In computing extra compensation where the services rendered are in broken periods and less than 2 hours intervene between such broken periods, the time served should be combined with the waiting time and computed as continuous service.

(*d*) Where 2 hours or more intervene between broken periods, one-half days' extra pay will be allowed for each distinct 2-hour period or part of a 2-hour period, if waiting time and actual service rendered within each period consist of at least 1 hour.

(*e*) The same construction should be given the act when charging for waiting time as governs the charge for services actually rendered. No charge should be made unless after having reported for duty the waiting time amounts to at least 1 hour.

Art. 1245. Sundays and holidays.—*(a)* For authorized services performed on Sundays and holidays between 8 a. m. and 5 p. m., customs officers and employees shall be entitled to 2 days' pay in addition to their regular compensation.

(b) Officers and employees who are paid on a per diem basis "when employed" will receive no other compensation for services rendered by them on Sundays and holidays than that allowed under the *overtime* act.

(c) If *overtime* service is performed on Sundays or holidays in connection with the unlading or other authorized service for two or more vessels or vehicles the 2 days' extra compensation shall be prorated between the different vessels or vehicles.

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United States of America

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UNITED STATES, Petitioner,
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ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

PETITION FOR CLARIFICATION OF THE OPINION OF THE COURT

ROBERT M. DRYSDALE,
Attorney for Respondents,
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PETITION FOR CLARIFICATION OF THE OPINION OF THE COURT

To The Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States.

Now Comes the respondents in the above entitled cases, by Robert M. Drysdale, their attorney, and respectfully shows unto the Court as follows:

In respondents' brief (pp. 61, 62) counsel suggested that in event that the Court disallowed extra compensation for night services, it would then become important to define the hours of a Sunday or a holiday for which extra Sunday and holiday pay is allowed. Respondents believe that the opinion of the Court fully covers that point (p. 10 of opinion) and that the extra Sunday and holiday pay is earned whenever the specified services are performed within the 24 hours of a Sunday or a holiday. Petitioner has taken the postion, however, that the opinion might mean otherwise; wherefor respondents request that the opinion of the Court be made specific in that regard.

Other questions of computation of overtime and Sunday and holiday pay will arise and which, we believe, can be answered by giving effect to the meaning of overtime pay and Sunday and holiday pay, as expressed in the opinion. We submit herewith, in an appendix, certain rules of computation which we believe are justified by the Court's decision, to be dealt with by the Court in any amendment to its opinion, or to be left to the Court of Claims for its decision, as may be deemed expedient by this Court.

ROBERT M. DRYSDALE,
Attorney for Respondents.

February 1944.

APPENDIX

OVERTIME PAY

Regular hours of work are eight hours within the same consecutive nine hour period of day or night, exclusive of Sundays or holidays, when duly scheduled in advance. When so scheduled, those hours become the employees' regular hours of work for the duration of that schedule. Unless otherwise so scheduled in advance, the regular hours of work on week days remain the hours between 8 a.m. and 5 p.m., as provided in the statute.[1]

Services performed (including waiting time when ordered to report for work) on week days in excess of or beyond the regular hours of work, whether preceding[2] or following the regular hours, even though falling within the nine hour period of from 8 a.m. to 5 p.m., as pro-

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[1] This gives full effect to the right of the collector to regulate the working hours. If they are not "regulated," the hours provided in the statute remain the regular hours of work.

Where the service is on a 24-hour basis, it is impracticable to schedule tours of duty on a nine hour basis, with one hour for food and rest. The old administrative practice in such cases is to prepare and post, a few days prior to its effective date, working schedules covering a two week period. These schedules usually call for eight hours continuous duty each day, including Sundays and holidays, with the understanding that the inspectors may take, when conditions permit, twenty minutes for lunch.

[2] This takes care of such instances as where the regular hours are from 8 a.m. to 5 p.m. and the employee is required to work from 6 a.m. to 5 p.m. He becomes entitled to one unit of overtime for the two hours from 6 a.m. to 8 a.m.

vided in the statute,[3] or other assignments to duty outside of the regular hours,[4] shall be subject to overtime compensation at the rate fixed in the statute; namely, one-half day's additional pay for each employee for each two hours or fraction thereof, of at least one hour, with the limitation that the overtime pay of any such employee shall not exceed 2½ days' additional pay within the same 24-hour period.

[3] Likewise, this takes care of such instances as where the working hours have been regulated and the extra hours worked fall within the nine-hour period from 8 a.m. to 5 p.m. specified in the statute; thus an employee scheduled in advance to work an eight hour tour from 6 a.m. to 2 p.m. may be required to remain on duty until 4 p.m., thus making ten hours of service. This rule recognizes the right of the collector to move the eight hour period so that the hour of 2 p.m. takes the place of 5 p.m. specified in the statute.

[4] This assures overtime compensation in cases where an officer, after have completed his regular hours has gone home, and is called back to work, as distinguished from the cases where he remains on duty after the close of his regular hours.

SUNDAY AND HOLIDAY PAY

Officers or employees who are required to work, or who are required to report for duty, and pursuant to such requirements report, or perform services, during any of the 24 hours of a Sunday or a holiday, shall be paid two days' extra compensation (Sunday and holiday rate) for any services on those days up to a limit of a normal day of eight hours (within a period of nine consecutive hours, computed from the time of first reporting).[5] Services performed in excess of the above eight hours,[6] or beyond or subsequent to such nine hour period,[7] shall be compensated at the overtime rate, as distinguished from the Sunday and holiday rate.

---

[5] This gives full effect to the right to Sunday and holiday pay for working at any time on Sundays and holidays.

[6] This recognizes the right to overtime pay in addition to Sunday and holiday pay when more than eight hours work is performed on Sundays or holidays. Heretofore when an employee has worked between the hours of 8 a.m. and 5 p.m. on Sunday, and also during the night hours on Sunday, as between 12 midnight and 8 a.m. or between 5 p.m. and 12 midnight, he has been paid two days' pay for any time worked between 8 a.m. and 5 p.m., and in addition thereto, has been paid at the night rate for work during the other hours.

[7] This protects the employee from being called to work on Sundays or holidays two or more times on the same day in order to make up an eight hour period; otherwise an officer may be required to work in such instances as from 6 a.m. to 8 a.m., then from 11 a.m. to 1 p.m., then 4 p.m. to 6 p.m., and 8 p.m. to 10 p.m., so breaking up his whole day for eight hours actual work. An officer or employee who is required to work on a Sunday or a holiday has the right to expect that his eight hours of work may be performed within a nine hour period.

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v.

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No. 143

UNITED STATES, PETITIONER

v.

JOHN H. ARBLE

No. 144

UNITED STATES, PETITIONER

v.

CHARLES C. MARTIN

No. 145

UNITED STATES, PETITIONER

v.

WALTER O. PLITZ

No. 146

UNITED STATES, PETITIONER

v.

GEORGE H. SPITZ

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

67556°—44

MEMORANDUM FOR THE UNITED STATES IN RESPONSE TO PETITION FOR CLARIFICATION

The Solicitor General, on behalf of the United States, respectfully joins in the petition of respondents for clarification of the opinion of the Court entered herein on January 3, 1944, and in support thereof states:

1. On January 3, 1944, this Court reversed the judgment of the Court of Claims in the above cases and remanded the proceedings to that court for determination of the claims of the respondents in accordance with the opinion entered herein. The mandate of this Court has not yet issued. This Court held, in accordance with the contention of the United States, that under Section 5 of the Act of February 3, 1911, as amended (19 U. S. C. 267), and Sections 401, 450, and 451 of the Tariff Act of 1930 (19 U. S. C. 1401, 1450, 1451), customs inspectors were not entitled to extra compensation for overtime services rendered between the hours of 5 p. m. and 8 a. m. on weekdays where such services were a part of and not in addition to their regular daily tour of duty consisting of 9 hours with 1 hour for food and rest (slip sheet, pp. 2, 9). Insofar as the question of extra compensation for overtime on weekdays is concerned, we believe that the opinion is clear and requires no clarification.[1]

[1] Respondents, in their petition for clarification of the opinion of the Court, advance the contention that services

2. This Court further held, contrary to the contention of the United States, that as to work on Sundays or holidays customs inspectors were entitled to extra compensation "without regard to the length of their daily tour or the hours of the day" (slip sheet, pp. 2, 10). On this branch of the case we share the view of the respondents that the opinion of the Court is susceptible of conflicting interpretations in several respects, and that clarification would be of advantage to all parties in proceedings hereafter to be had in the Court of Claims on the mandate to be issued by this Court in these cases, and in other proceedings involving customs inspectors' claims to extra compensation which are now pending or may hereafter be instituted.

(a) Under the regulations and the administrative practice of the Bureau of Customs as in effect at the times involved in these proceedings, a distinction was taken between services performed between the hours of 8 a. m. and 5 p. m. on Sundays and holidays and services performed before 8 a. m. or after 5 p. m. on such days. Only the

performed before 8 a. m. and after 5 p. m. on weekdays can constitute "regular hours of work" only "when duly scheduled in advance." We submit that the method by which the daily tour of duty is to be established is a matter for administrative discretion in the orderly operation of the customs service, and that there is nothing in the overtime statutes or in the views heretofore expressed by the Court in its opinion that calls for "clarification" as to the manner in which that administrative discretion should be exercised.

former were treated as "Sunday or holiday" duty within the meaning of the legislation providing for extra compensation; services performed before 8 a. m. or after 5 p. m. on Sundays or holidays were treated as "overtime services" compensable at the overtime (as distinguished from the Sunday or holiday) rate, but only if constituting true "overtime services" performed in addition to the regular weekly tour of duty.[2]

The opinion of the Court contains no discussion of the validity of these regulations, or of the distinction which they embody. Absent an explicit discussion by the Court, the assumption is at least permissible that the Court did not intend a holding *sub silentio* that this long-established administrative practice was improper. On the other hand, the statement of the Court that as to Sun-

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[2] The pertinent Customs Regulations ((1931) Arts. 1230 (a), 1231 (a); (1937) Arts. 1244 (a), 1245 (a)), which were placed before the Court by the respondents in their supplemental memorandum, pp. 2–3, provide as follows:

"ART. 1244. *Rate of Compensation.*—(a) For service performed after 5 p. m. of any days, including Sundays and holidays, one-half day's pay will be allowed for each 2 hours or fraction thereof of at least 1 hour that the overtime extends beyond 5 p. m., provided that the overtime is not less than one hour. * * *

"ART. 1245. *Sundays and Holidays.*—(a) For authorized services performed on Sundays and holidays between 8 a. m. and 5 p. m., customs officers and employees shall be entitled to 2 days' pay in addition to their regular compensation."

Support for this departmental interpretation is found in the definitions of "day" and "night" in Sections 401 (f) and (g) of the Tariff Act of 1930, set forth at p. 69 of our brief.

days and holidays the statute requires extra compensation "without regard to the length of their daily tour or the hours of the day" (slip sheet, p. 10) lends support to the view, apparently adopted by the respondents, that the Court intended to hold, notwithstanding the above-mentioned regulations and administrative practice, that all services performed at any time within the 24 hours of a Sunday or a holiday are entitled to extra compensation, regardless of whether such services are additional to a regular weekly tour of duty.

We respectfully request that the Court indicate which of these two conflicting views represents the contruction which it intended to place upon the statutes and regulations.

(b) Assuming that the respondents are correct in their contention regarding the right to extra compensation for all services rendered at any time of the day on Sundays or holidays, a further question is presented as to the basis of computation of such extra compensation. The respondents suggest, at page 5 of their petition for clarification of the opinion, that extra compensation is to be paid at the rate of two days' pay for any services performed at any time on a Sunday or holiday up to 8 hours, and that in addition extra compensation at the "overtime" rate is to be paid for any services rendered in excess of 8 hours. While this construction is consistent with the distinction previously taken in departmental practice

between services rendered between 8 a. m. and 5 p. m. on Sundays and holidays and services rendered at other times on those days, such a construction is, we submit, inconsistent with the ground upon which the Court appears to have based its holding with regard to Sunday and holiday pay. As we understand the opinion of the Court, extra compensation is to be paid for Sunday and holiday work not as "overtime services" but simply because the work is performed on a Sunday or a holiday. If this is correct, it would seem to follow that those parts of the legislation which provide compensation for overtime have no place in computing compensation for services on Sundays and holidays. Services on Sundays and holidays are compensable at the rate of two days' pay, regardless of the length of such services and of the times of day at which they are performed. They are so compensable not because they are overtime but because of the particular day upon which they are performed. We submit that neither the statute nor the opinion of this Court warrants the view that services performed on a Sunday or a holiday may be compensated both at the Sunday and holiday rate and also at the overtime rate.

Furthermore, even if the respondents are held to be correct in their view that overtime pay should be given for services in excess of 8 hours on a Sunday or a holiday, we submit that proper application of the overtime concept to such serv-

ices requires that such overtime pay should be given only if the services are not merely in excess of 8 hours on the particular Sunday or holiday, but also in excess of the regular weekly tour of duty.[3]

(c) In our brief, at pp. 51–55, we pressed upon the Court's attention Article 9 of the Customs Administration Act of 1938, which amended Section 451 of the Tariff Act of 1930. This amendment provides:

> Nothing in this section shall be construed to impair the existing authority of the Treasury Department to assign customs officers or employees to regular tours of duty at nights or on Sundays or holidays when such assignments are in the public interest.

This amendment, having been enacted into law after the period of time with which these proceedings are concerned, was urged upon the Court only as indicating legislative recognition and ratification of the existing departmental practice. No mention of the amendment was made by the Court in its opinion.

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[3] Even on this assumption, the Bureau of Customs will under the opinion of this Court be compelled as an administrative necessity to work a substantial number of inspectors seven days a week, in order to avoid a situation in which inspectors working only six days a week receive extra compensation in addition to their full government salary based upon a six-day week. If the respondents' contention is adopted, it will be necessary to require a seven-day workweek from many more inspectors.

While the prospective force of this amendment was not in issue in these cases, the United States is now confronted with a contention, by counsel for customs inspectors who have brought or intend to bring suit for extra compensation for services performed after 1938, to the effect that the Court, in failing in its opinion to advert to the amendment, intended to reject also our contention as to its prospective purpose and effect. In other words, it is now contended that the opinion of this Court forecloses the United States from urging in future cases that the 1938 amendment, at least in its prospective operation, clearly authorizes the Collector of Customs to assign customs inspectors to regular tours of duty on Sundays and holidays without the payment of extra compensation. In view of the extensive legislative material, set forth at pages 132–159 of our brief, supporting our construction of the amendment, we not believe that this Court intended merely by its silence to adopt an opposite construction; and if we are correct, we respectfully request that in order to avoid confusion in subsequent cases the opinion of this Court should be clarified by a statement of the Court's conclusions in this respect.

3. The Bureau of Customs wishes as promptly as possible to adopt regulations which will conform to the decision of this Court in these cases. It must determine the extent to which inspectors must be required to work seven days a week.

The Bureau is confronted with the problem of requiring special licenses and bonds for Sunday and holiday services from toll bridges and tunnels, and of determining the amounts to be collected from them; it must collect from those who in the past have utilized the services of customs inspectors on Sundays or holidays and have therefore, under the opinion of this Court, incurred responsibility for extra compensation which the Bureau in turn is required to pay over to the inspectors; it must make appropriate efforts to recover from bridge and tunnel companies which have not in the past requested special licenses to unlade or posted bonds to pay the compensation and expenses of cusom inspectors assigned to night or Sunday or holiday duty. The claims of the Government to reimbursement will almost certainly give rise to extensive litigation.

The United States is thus confronted with much litigation, both in the form of claims by customs inspectors[4] and in the form of claims by the United States against the carriers for reimbursement. Clearly, the more specific the opinion in the instant cases can be made, the less room for controversy will exist, and the smaller will be the burden of litigation on the United States, on the

[4] Aside from the 172 cases pending in the Court of Claims, we are advised of approximately 100 more suits which will be filed in the immediate future. Even with these additional cases, there will be represented but a part of the 500 or 600 inspectors entitled to claim.

customs inspectors, on the carriers, and on the courts.

The United States stands ready to present further argument, written or oral, on the questions presented herein if this Court should indicate that such further argument would be helpful.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

FEBRUARY 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

SUPREME COURT OF THE UNITED STATES.

Nos. 142-146.—October Term, 1943.

142	The United States, Petitioner, *vs.* Howard C. Myers.	On Writs of Certiorari to the Court of Claims.
143	The United States, Petitioner, *vs.* John H. Arble.	
144	The United States, Petitioner, *vs.* Charles C. Martin.	
145	The United States, Petitioner, *vs.* Walter O. Plitz.	
146	The United States, Petitioner, *vs.* George H. Spitz.	

[January 3, 1944.]

Mr. Justice Reed delivered the opinion of the Court.

These five suits were filed in the Court of Claims by respondents, who are customs inspectors stationed at the Port of Detroit.[1] They have been selected as test cases from a larger number of similar suits. No significant difference in the claims as to services rendered or otherwise is pointed out to us, and we see none. Even the periods for which recovery is sought, September 1, 1931, through August 31, 1937, are identical. We shall therefore state the issues and explain our conclusion in terms of the *Myers* case only, and its determination requires a like result in the other cases.

The precise issue is whether or not the provisions of Section 5 of the Act of February 13, 1911, as amended,[2] and Sections 401,

[1] Federal Register, August 25, 1937; Code of Federal Regulations, Title 19, Customs Duties, Chap. I, Bureau of Customs.

[2] 41 Stat. 402, c. 61; 19 U. S. C. 267:

"Sec. 5. That the Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on

450 and 451 of the Tariff Act of 1930,[3] entitle Mr. Myers to extra compensation over and above his regular salary as customs inspector for night, Sunday and holiday services performed during the stated period. Its solution depends upon whether or not when Section 3 speaks of "overtime services," it includes, first, any authorized service rendered between 5 o'clock P.M. and 8 o'clock A.M., without regard to whether this service is within the regular hours of his assignment to duty, and, second, Sunday and holidays without regard to the time of day when the authorized services are performed. The Court of Claims entered judg-

duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo, or merchandise for transportation in bond or for exportation in bond, or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage, such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. The said extra compensation shall be paid by the master, owner, agent, or consignee of such vessel or other conveyance whenever such special license or permit for immediate lading or unlading or for lading or unlading at night or on Sundays or holidays shall be granted to the collector of customs, who shall pay the same to the several customs officers and employees entitled thereto according to the rates fixed therefor by the Secretary of the Treasury: *Provided*, That such extra compensation shall be paid if such officers or employees have been ordered to report for duty and have so reported, whether the actual lading, unlading, receiving, delivery, or examination takes place or not. Customs officers acting as boarding officers and any customs officer who may be designated for that purpose by the collector of customs are hereby authorized to administer the oath or affirmation herein provided for, and such boarding officers shall be allowed extra compensation for services in boarding vessels at night or on Sundays or holidays at the rates prescribed by the Secretary of the Treasury as herein provided, the said extra compensation to be paid by the master, owner, agent, or consignee of such vessel: *Provided further*, That in those ports where customary working hours are other than those hereinabove mentioned, the Collector of Customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said ports, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay herein fixed."

[3] 46 Stat. 708, 715, c. 497, Title IV; 19 U. S. C. 1401, 1450, 1451.

"SEC. 401. MISCELLANEOUS.

When used in this title or in Part I of Title III—

(a) *Vessel*.—The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

(b) *Vehicle*.—The word "vehicle" includes every description of carriage or other contrivance used, or capable of being used, as a means of transportation on land, but does not include aircraft.

ment for claimant for both nighttime and Sunday and holiday services. 99 Ct. Cl. 158.

As the difficulties of applying the statute continually arise at any port where the normal working hours of the customs employees named in the section are not limited to 8 A. M. to 5 P. M. with Sundays and holidays off, we granted certiorari to review the judgment of the Court of Claims. — U. S. —. We think the judgment should be reversed as to nighttime services and affirmed as to Sunday and holiday services.

The Port of Detroit possesses a wide variety of transportation facilities which connect it with Canada and which require customs inspection of merchandise, baggage and passengers.[4] Evidently

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(f) *Day.*—The word 'day' means the time from eight o'clock antemeridian to five o'clock postmeridian.

(g) *Night.*—The word 'night' means the time from five o'clock postmeridian to eight o'clock antemeridian.

SEC. 450. UNLADING ON SUNDAYS, HOLIDAYS, OR AT NIGHT.

No merchandise, baggage, or passengers arriving in the United States from any foreign port or place, and no bonded merchandise or baggage being transported from one port to another, shall be unladen from the carrying vessel or vehicle on Sunday, a holiday, or at night, except under special license granted by the collector under such regulations as the Secretary of the Treasury may prescribe.

SEC. 451. SAME—EXTRA COMPENSATION.

Before any such special license to unlade shall be granted, the master, owner, or agent, of such vessel or vehicle shall be required to give a bond in the penal sum to be fixed by the collector conditioned to indemnify the United States for any loss or liability which might occur or be occasioned by reason of the granting of such special license and to pay the compensation and expenses of the customs officers and employees assigned to duty in connection with such unlading at night or on Sunday or a holiday, in accordance with the provisions of section 5 of the Act entitled 'An Act to provide for the lading or unlading of vessels at night, the preliminary entry of vessels, and for other purposes,' approved February 13, 1911, as amended. . . . At the request of the master, owner, or agent of any vessel, the collector shall assign customs officers and employees to duty at night or on Sunday or a holiday in connection with the entering or clearing of such vessel, or the issuing and recording of its marine documents, bills of sale, mortgages, or other instruments of title, but only if the master, owner, or agent gives a bond in a penal sum to be fixed by the collector, conditioned to pay the compensation and expenses of such customs officers and employees, who shall be entitled to rates of compensation fixed on the same basis and payable in the same manner and upon the same terms and conditions as in the case of customs officers and employees assigned to duty in connection with lading or unlading at night or on Sunday or a holiday.

[4] The facilities were listed by the Court of Claims as follows:

Detroit and Windsor Ferry,
Walkerville Ferry,
Detroit and Canada Tunnel,
Ambassador Bridge,
Michigan Central Tunnel,
Wabash Railway Ferries,
Pere Marquette Railway Ferries,
Grand Trunk Railway Slip Dock.

a rotation of assignments of posts and hours among inspectors at Detroit was carried out by the collector. Mr. Myers had either night or Sunday and holiday service or both at all the various posts of duty which are listed in the note. He was paid his annual salary throughout the period. This was a base pay of $2100, subject to additions and subtractions which were generally applicable to government employees.[5] The claim is for service performed at nighttime[6] on weekdays, Sundays and holidays, and in daytime on Sundays and holidays.

At the threshold the Government urges that the statutes heretofore quoted do not create an obligation on the part of the United States to pay the extra compensation which is sought. A carrier may procure customs service at night only by special license, and the statutes say the extra compensation shall be paid "by the licensee" to the collector of customs who shall pay the same "to the inspectors."[7] As the extra compensation here sued for was not collected in whole or part from the carriers concerned, it is urged that the United States is not liable to the plaintiff.[8]

The legislative history shows that the proponents of extra compensation constantly made the point that the Government would not be out of pocket by the legislation.[9] Where the United States stood as a protector of Indians with statutory authority, carefully marked out by a series of enactments, to collect sums for the benefit of its dependents, we held that the Government's failure to collect did not give rise to a liability. *Creek Nation* v. *United States*, 318 U. S. 629, 637, 639. In that case we said that authorization to collect did not create a mandatory duty, particularly where the Indians also might have sued. Likewise, under similar

[5] E. g., Economy Act of 1932, 47 Stat. 382.

[6] Nighttime is defined as the hours between 5 P. M. and 8 A. M., Customs Regulations 1937, Art. 1462; 46 Stat. 708, *supra*, note 3.

[7] See note 3, *supra*. Customs Regulations 1931, Art. 1232, was as follows: "Art. 1232. ACCOUNTING FOR OVERTIME.—(a) Upon receipt of any payments for the services of officers and employees at night or on Sundays or holidays, collectors shall immediately deposit the same in their special deposit accounts and make payment therefrom by check to the officers and employees who rendered the services, and refund in the same manner any funds deposited in excess, these funds to be accounted for in the same manner as other moneys deposited in special deposit accounts."

[8] We doubt whether or not the Government presents this question in its petition for certiorari. As it is the basis of the litigation, however, we resolve that doubt in favor of an adjudication of this issue.

[9] Hearings on H. R. 9525, 61st Cong., 2d Sess., pp. 461, 463, 464-465. Hearings on H. R. 6577, 66th Cong., 1st Sess., 13. When the 1920 amendment was under consideration, its sponsor, Senator Calder, said: "the shipowner would pay the collector for it, and then, in turn, the men would be paid by the Government." 59 Cong. Rec. 640.

circumstances, we have determined that over-collection did not create liability for reimbursement. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415, 418-19, 423. But here the United States is neither protector nor agent. It is an employer who issues orders to the inspectors directing the performance of services. The work is done under the statutes. No inspector may "receive any salary in connection with his services as such an official or employee from any source other than the Government of the United States." Act of March 3, 1917, c. 163, 39 Stat. 1106. These payments are made by the licensees to the collector at rates fixed by the Secretary of the Treasury. This is extra compensation over and above the annual salary, not a payment from licensees. Section 451 requires a bond from the licensee to "pay the compensation and expenses of the customs officers," but the payment must be made to the collector under Section 5. These facts lead us to the view that the statutes create an obligation on the part of the United States to pay to inspectors such sums as they may earn under their provisions.[10]

We come then to an examination of the extent of the obligation under the several sections heretofore quoted in notes 2 and 3. From the earliest days, customs inspections have normally proceeded in daylight. By special license, the work of the customs might be performed at night.[11] Inspectors were on duty continuously and at first were paid on a per diem basis.[12] By the Act of March 3, 1873, R. S. Section 2871, the practice of

[10] The First Deficiency Appropriation Act, fiscal year 1936, 49 Stat. 1630, June 22, 1936, and so within the period covered by this suit, made the appropriation for the Bureau of Customs "available" for payment of these claims. This has been continued, 56 Stat. 150, 155. The Treasury and Post Office Departments Appropriation Act of 1944, Public Law 102, 78th Cong., 1st Sess., c. 179, slip law p. 7, 57 Stat. 250, 256, changed the form of the authorization from making the appropriations available for this payment, to a direct appropriation for payment. But see Hearings, Subcommittee of the Committee on Ways and Means (House) on H. R. 6577, 66th Cong., 1st Sess., p. 18.

[11] 1 Stat. 665, § 50.

[12] The Government brief furnishes us a convenient summary of the pay legislation: "The pay originally fixed at $2 per diem (Act of March 2, 1799, 1 Stat. 704, 706) was gradually increased to a maximum of $6 in 1909 and $7.80 in 1923 (Act of April 20, 1816, 3 Stat. 306; Rev. Stat. § 2733; Act of April 29, 1864, 13 Stat. 61; Act of March 4, 1909, 35 Stat. 1065, Sec. 2; Act of March 4, 1923, 42 Stat. 1453). By the Act of May 29, 1928, 45 Stat. 955 (19 U. S. C. 6(a)), customs inspectors were given fixed salaries and paid on annual basis. Compensation of respondents is $2,100 per annum, which may be increased by promotion to a maximum of $3,300. Even prior to 1928, when compensation was changed to an annual basis, customs inspectors, regularly employed and paid on a per diem basis, were paid for 365 days . . . thus receiving the equivalent of an annual salary."

licensees of paying extra compensation for nighttime service[13] (between sunset and sunrise) was formalized by authorizing the collector to fix reasonable extra compensation and to collect and distribute it among the inspectors. The provisions of that section gradually were extended to additional employees and to different circumstances. 23 Stat. 53, 59; 34 Stat. 633. In 1911 further changes were made by an Act for lading and unlading vessels. 36 Stat. 901. Section 5 under examination here emerges there in nearly its present form. Extra compensation for nighttime services was continued and was authorized for the first time for Sundays and holidays.[14] The latest changes were made in Section 5 in 1920. "Night" services became "overtime" services. Sundays and holidays were placed at the beginning of the section in juxtaposition with "hours" which were fixed at from 8 A. M. to 5 P. M. The last proviso vesting authority in the Collector of Customs to regulate the hours of employees "so as to agree with prevailing working hours in the ports" was added.[15] The Tariff Act of 1922, Sections 401, 450 and 451, extended the provisions of Section 5 of the lading and unlading act so as to cover passengers and baggage arriving by vehicle. These sections as they now appear in the Tariff Act of 1930 are in note 3, *supra*.

The Collector of Customs at Detroit, during the years in question, assigned inspectors to tours of duty of eight hours each day, which tours might be at any time within a twenty-four hour period.[16] The length of the weekly tour varied with the post and with the state of the federal legislation. The findings of the Court of Claims as to the actual results are set out in the note below.[17] In the administration of customs regulations based on the sections

[13] S. Rep. No. 380, 41st Cong. 3d Sess., pp. 42, 139.

[14] Nighttime was apparently administratively determined to be between 6 P. M. and 7 A. M., 59 Cong. Rec. 2171; Hearings before the Committee on Ways and Means, House of Representatives (75th Cong., 1st Sess.), on H. R. 6738 (one of the bills which became the Customs Administration Act of 1938), amending Section 451 of the Tariff Act of 1930 (Act of June 25, 1938, c. 679, § 9, 52 Stat. 1082), p. 185.

[15] See note 2 and for a graphic explanation of the changes, see International Ry. Co. v. Davidson, 257 U. S. 506, 510.

[16] This was settled practice. International Ry. Co. v. Davidson, 257 U. S. 506, 508.

[17] "4. As used in these findings the word 'nighttime' refers to the period 5 o'clock p. m. of any day to 8 o'clock a. m. of the next day; and the word 'daytime' to the period 8 o'clock a. m. of any day to 5 o'clock p. m. of the same day. 'Excess pay' refers to pay in excess of the inspector's annual salary. The word 'week day' refers to any day of the week other than Sundays or whole holidays, and the word 'holiday' refers to a holiday of not less than 24 hours.

of the Tariff Act of 1930 and Section 5 of the Act of 1911 were issued by the Treasury Department. Customs Regulations 1931 and 1937. So far as here pertinent they are substantially alike.[18]

The legislative history of the various acts makes clear the intention of Congress to allow extra compensation only when there are overtime services in the sense of work hours in addition to the regular daily tour of duty without regard to the period within the twenty-four hours when the regular daily tour is performed.

"5. Before the opening of the Ambassador Bridge November 15, 1929, all customs inspectors at the port of Detroit were regularly assigned to eight-hour tours of duty, which might be any period of that length within the 24 hours of any day of the week, including Sundays and holidays. They did not receive for nighttime services performed on such tours weekdays, Sundays, or holidays, any excess pay, but they did receive excess pay for daytime service so performed on Sundays or holidays. The inspectors had an eight-hour day and a 56-hour week.

"This practice, however, did not wholly prevail at the Michigan Central Railway, where for certain periods prior to November 15, 1929, excess pay was not allowed for daytime service on Sundays or holidays.

"6. Upon the opening of the Ambassador Bridge November 15, 1929, there was a change in practice at the port of Detroit.

"At the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge, and the freight yard of the Michigan Central Railway, the customs inspectors were given an eight-hour day and a 48-hour week.

"Excess pay was discontinued for daytime service performed on Sundays or holidays, within the 48-hour week. No excess pay was given for nighttime service performed Sundays, holidays, or weekdays, within the 48-hour week.

"At the Michigan Central Railway passenger station and the Wabash Railway and Pere Marquette Railway ferries, and the Grand Trunk Railway Slip Dock the hours continued as before, with an eight-hour day and a 56-hour week. Excess pay was continued at these last four places for daytime service performed on Sundays and holidays, even though within the 56-hour limit, but no excess pay was given for nighttime service there on Sundays, holidays, or weekdays, performed within the 56-hour period.

"After March 3, 1931, the date of going into effect of the Saturday half-holiday for Federal employees, the hours of employment per week were reduced to 44 at the Detroit and Windsor Ferry, the Walkerville Ferry, the Detroit and Canada Tunnel, the Ambassador Bridge and the freight yard of the Michigan Central Railway, and to 52 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries, and at the Grand Trunk Railway Slip Dock, with conditions of excess pay as before but within and based upon the new period of 44 hours. Pay in excess of their annual salaries was given to inspectors for time served in excess of 44 hours per week at the passenger station of the Michigan Central Railway, at the Wabash Railway and Pere Marquette Railway ferries and at the Grand Trunk Railway Slip Dock notwithstanding the 52-hour week."

[18] The references are to the 1937 editions:

"Art. 1242. *Extra compensation.*—(*a*) Customs officers and employees performing services at night, or on Sundays and holidays, for lading or unlading of cargo or merchandise . . . shall receive extra compensation, to be paid by the master, owner, or agent of the vessel, or by the transportation company . . ."

Congressman Moore explained the purpose as follows (Hearings on H. R. 9525, 61st Cong., 2d Sess., at p. 470):[19]

"Mr. Fordney. The Compensation for night work would be more than twice the compensation for day work?

"Mr. Moore. I think not, but so long as a man works in the daytime and then continues his work through the night, if the expense does not come out of the Government he should be paid double."

At the hearings, just prior to the 1920 amendment to Section 5, the understanding apparently was that extra compensation would begin only after a day's work of ten or eleven hours. The pay of an inspector was per diem and was paid for each day in the year. The Treasury Department wrote to the Chairman:

"The department has under consideration a plan whereby boarding officers and inspectors of customs will be assigned to duty in eight-hour shifts and will not, therefore, be called upon to work overtime and no extra compensation paid to officers assigned to the night shift. In order to carry out such plan it will be necessary to secure additional appropriations, and pending the adoption of the plan it will, of course, be necessary to detail inspectors and other employees for night work."[20]

"(*c*) The extra compensation for overtime services is in addition to the regular compensation paid by the Government in the case of officers and employees whose compensation is fixed on the ordinary per diem basis and those receiving a compensation per month or per annum."

"Art. 1462. *Hours of service.*—(*a*) The official hours of officers, clerks, examiners, and employees, except those hereinafter specified, will be from 9 a. m. to 4:30 p. m., with a half hour for lunch.

"(*b*) The official hours of the following employees will be: Staff officers, station inspectors, and inspectors to whatever duty assigned, sugar samplers, samplers, laborers, storekeepers, and outside messengers, from 8 a. m. to 5 p. m., 1 hour for lunch; verifiers-openers-packers and openers and packers, 8 a. m. to 4:30 p. m., one half hour for lunch; custom guards not less than 8 hours.

"(*c*) The above hours may be extended as the needs of the service demand, and such extension shall be without additional compensation, except as provided for in the act of February 13, 1911, as amended by the act of February 7, 1920.

"(*d*) The act of February 7, 1920, also provides that in those ports where customary working hours are other than those above mentioned, the collector of customs is vested with authority to regulate the hours of customs employees so as to agree with prevailing working hours in said port, but nothing contained in this proviso shall be construed in any manner to affect or alter the length of a working day for customs employees or the overtime pay fixed for such employees.

[19] This quotation is from hearings May 5, 1910, on a bill similar to the one which became the Act of February 13, 1911. Hearings before House Com. on Ways and Means, on H. R. 9525, 61st Cong., 2d Sess.

[20] Hearings before a subcommittee of the Committee on Ways and Means (House) on H. R. 6577, 66th Cong., 1st Sess., October 11, 1919, pp. 1-19, particularly p. 11.

There are other references in the hearings to the use of the "shift" system to secure twenty-four hour service without extra compensation. The legal basis for a collector's authority to assign inspectors in this way is the last proviso of Section 5, note 2, *supra*. It gives the collector authority in those ports where customary working hours are other than 8 A. M. to 5 P. M. to regulate the hours of inspectors so as to agree with prevailing working hours in the ports. In speaking of the provision after its adoption, an official of the Customs Inspectors Association said at a hearing on an immigration inspectors bill (Hearings on S. 1504, S. 1774 and S. 2188, 67th Cong., 1st and 2d sess., p. 130):

"To meet the condition at New Orleans, where the hours of labor are from 7 o'clock a.m. to 4 o'clock p.m., this proviso at the end of the bill was put in allowing collectors to adjust the inspectors' hours to the customary working hours at ports where the practices are different. This proviso also applies to the Canadian border at places where traffic is continuous during the 24 hours, such being the 'customary working hours'—and the inspectors work in 8-hour shifts without overtime."[21]

When we examine the language of Section 5, either without extrinsic aid, or with the benefit of the historical and legislative background, we find convincing authority to support the Government's view as to the meaning of overtime. "Overtime" as we pointed out above was substituted by the 1920 amendment of Section 5 for "nighttime" services. The section requires employees to "remain" on duty. The usual instance of the payment of extra compensation would be for work after 5 P. M. by an inspector who had previously worked full time. The Government is correct in its interpretation of the last proviso of Section 5 as permitting shifts in an inspector's regular hours of work. Night assignments are an old administrative practice. It is true that the proviso apparently was passed to meet a New Orleans situation but the language is general. It does not restrict the collector to minor variations in hours. We are led to the conclusion that overtime, as applied to week days, refers to hours longer than the daily limit of 8 A. M. to 5 P. M., nine hours with one hour for food and rest. Furthermore, these tours of duty under the proviso are movable within the twenty-four hour period in accordance with prevailing working hours and the requirements of the service.

We do not see that *International Ry. Co.* v. *Davidson*, 257 U. S. 506, decides otherwise. That was a suit to enjoin the Collector

[21] See also Hearings, Senate Committee on Finance, 71st Cong., 1st Sess., on H. R. 2667, p. 494.

from enforcing the license provisions of Section 5, note 2, *supra*, as to passengers and baggage, against an international bridge. These were held inapplicable to bridges. In speaking of Section 5, the opinion stated: "This substituted section defines what shall be deemed overtime, how the rate of extra pay shall be fixed, and what the work is, for which extra compensation shall be paid." It did not, however, interpret the statute or consider the proviso both of which we are called upon to do here. *Contra, see Ferguson* v. *Port Huron & Sarnia Ferry Co.*, 13 F. 2d 489, 492.

As to Sundays and holidays, we construe the statute to require extra compensation for inspectors without regard to the length of their daily tour or the hours of the day. Before Section 5 there was no authority to pay extra compensation for Sunday and holiday work. Revised Statutes, Section 2871, allowed extra pay for nighttime work only. Somewhat indirectly the Act of February 13, 1911, gave Sunday and holiday pay and the 1920 amendment made the right to that extra compensation clear by saying extra compensation shall be paid inspectors "who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays." This language and the Customs Regulations, note 18, *supra*, give an employee who works regular hours weekdays in daytime extra pay for Sunday and holiday work. The statute covers also those who work outside the statutory normal hours. Logically, if Sundays and holidays were not to receive extra compensation, without regard to whether services on those days were overtime, there would have been no occasion to add Sundays and holidays to the overtime. Overtime would cover every situation.

The proviso of Section 5 does not give the Collector of Customs authority to make assignments which deprive inspectors of this Sunday and holiday pay. It authorizes adjustments of hours but specifically forbids alteration of overtime pay. It is silent as to Sundays and holidays which leaves the earlier grant of extra compensation in effect. The administrative practice is uncertain. It does not support a contrary conclusion. The Government cites excerpts from testimony on amendatory bills, not here directly involved, which indicate the extra compensation is paid for Sundays and holidays.[22] Findings 5 and 6 of the Court of Claims, note 17,

[22] Hearings on S. 1504, S. 1774 and S. 2188, Committee on Commerce (Senate), 67th Cong., 1st and 2d Sess., pp. 30, 31 and 130.

supra, show that extra compensation was paid at times for Sunday and holiday services.[23]

Two further contentions of the Government require consideration. It is said that Section 5 of the 1911 Act as amended does not apply to services rendered at a bridge or tunnel. This Court so held in 1922. *International Ry. Co.* v. *Davidson*, 257 U. S. 506, 512. At that time, the section's application was limited to "vessel or other conveyance." Since then Sections 401, 450 and 451 of the Tariff Act of 1922, 42 Stat. 858, 948, 954, and of the Tariff Act of 1930, note 3, *supra*, have expanded the instrumentalities to include every contrivance capable of being used as a means of transportation on land or water.[24] The difference in definition, we think, brings bridges and tunnels under the overtime pay requirements of Section 5.

Finally the Government urges that in awarding compensation for "overtime" services credit should be allowed to it for that part of the base pay received for such services. We think the Congressional intention to give extra compensation precludes such a claim. The inspectors in addition to their regular salaries for week days are entitled to the statutory additional pay for overtime, Sundays and holidays.

The judgment of the Court of Claims is reversed and the proceeding remanded to that Court for determination of the claim of the inspectors in accordance with this opinion.

Mr. Chief Justice STONE is of the opinion that the judgment should be reversed in its entirety and the suits dismissed.

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[23] See T. D. 49658, approved July 18, 1938, after the period here in question, where Art. 1242(g) is amended to read as follows:

"(g) Extra compensation is not authorized for any service performed by a customs officer or employee pursuant to his assignment to a regular tour of duty at night or on a Sunday or holiday."

There are similar overtime acts in other services. They allow Sundays and holidays extra. Cf. 46 Stat. 1467, and U. S. Dept. of Labor, Bureau of Immigration General Order No. 175, April 27, 1931, (d); 49 Stat. 1380 and Dept. of Commerce Circular No. 307, December 17, 1938, Bureau of Marine Inspection and Navigation, II; 48 Stat. 1064, as amended, and Federal Communications Commission Rules and Regulations, Part 8, § 8.301(i).

[24] See also Section 9 of the Customs Administration Act of 1938. The change was deemed significant as to railroads. Compare Mellon v. Minneapolis Ry., 285 Fed. 980, with Mellon v. Minneapolis Ry., 11 F. 2d 334.